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CASES REMONDED

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0282-77-R Local Union 1739, International Brotherhood of Electrical Workers, (Applicant), v. Shakell Electric and Refrigeration Contractors, (Respondent).

Certification – Section 79 – Section 7a – Whether unfair labour practice sufficiently serious to justify certification without vote pursuant to section 7a – Effect of unfair practice on small bargaining unit

BEFORE: Rory F. Egan, Alternate Chairman and Board Members L. Hemsworth and M. J. Fenwick.

APPEARANCES: William J. Moore and William Brady for the applicant; G. Grossman and Alf Shakell for the respondent.

DECISION OF THE BOARD: August 24, 1977.

1. This is an application for certification in which the applicant has requested certification without a vote under the provisions of section 7a of The Labour Relations Act.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.
3. The Board further finds that this is an application for certification within the meaning of section 108 of the Act.
4. Having regard to the agreement of the parties, the Board further finds that all electricians and electricians' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board further finds that there were ten employees in the bargaining unit at the time the application for certification was made. The evidence of membership submitted by the applicant shows that five of these employees were members of the applicant on May 20, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. Section 7a of the Act provides as follows:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

7. Before relief can be given under the provisions of section 7a, the applicant must meet the three conditions inherent in the section. There must have been a contravention of the Act. This contravention must have brought about a situation where it would be unlikely that the true wishes of the employees could be ascertained in a representation vote and, finally, the applicant must have support in the bargaining unit, adequate for the purposes of collective bargaining.

8. The evidence is clear that, following the application for certification on May 12th, Mr. Alf Shakell, the sole proprietor of the respondent, on May 19th, made strenuous and improper attempts to dissuade those of his employees who had become members of the union from proceeding with the application and from continuing their membership in the applicant union. The evidence is that the respondent inquired of his employees if they had joined and why they had done so. When it was made known to him that an increase of \$1.00 per hour was a significant matter, the respondent offered them \$1.00 per hour increase, provided they would drop the application, or would join the Christian Labour Association of Canada (C.L.A.C.). He furthermore went to the extent of preparing two cheques for one of the employees – one at the current rate and the other embodying an increase. The respondent was evasive and vague as to the conditions under which the higher amount was to be paid. We are convinced, upon reviewing all the evidence, that the respondent was attempting to induce the employee concerned to abandon the union in order to obtain the larger cheque.

9. These matters took place at meetings held at the request of the respondent on May 19th. The employee members of the applicant met separately to discuss the propositions of the respondent, but refused to accept them. The respondent said that he took the position that since the \$1.00 increase seemed to be the reason for joining the union, he offered the \$1.00 since it was what they wanted and there would be no need for the union. He told the Board that he, in fact, told the employees concerned that "if this is what you want (i.e. the \$1.00 raise), you have got it so go back to work and forget about the union". It was suggested that the parties were merely bargaining during these meetings. The Board is unable to give any weight to that contention as in any way ameliorating the conduct of the respondent. The upshot of these meetings was that the main union supporters were terminated.

10. We have no hesitation in finding that the "layoff" was called because of, and in an attempt to end, the union activities of the employees, contrary to the provisions of The Labour Relations Act. Section 79 charges were laid and the employees were subsequently reinstated on agreement of the parties before a Labour Relations Officer. The Board's finding of a breach of the Act is based, however, on the evidence adduced before it.

11. It is not without significance in the circumstances to note that the bargaining unit, the composition of which, it must also be observed, was agreed upon by the applicant and the respondent, comprised, as already noted, ten employees, five of whom are known by the employer to be members of the union. Three of the remainder are sons of the proprietor and of these latter, two have been vocal in expressing opposition to the union.

12. There have been other instances when sons and other relatives of a proprietor have been in the bargaining unit so that the present situation is not altogether unique from that point of view. However, the proportion of relatives to other employees is unusually

high. It is also a fact that there is no restriction upon the right of employee-relatives to voice their opinions pro or con the union. In the present case, Don Shakell, who was at the material time a working foreman in the bargaining unit, stated that not only was he not going to join I.B.E.W., but that if anyone was going to make money it would be Shakell. During the course of the meetings Don Shakell came in yelling that he was going to fire all the employees who were at the meeting. In view of the fact that he was in the bargaining unit by agreement of the union and the company, his threat cannot be said to have carried any real weight. His conduct, however, does clarify his position with respect to the union. Other acts of his and of his brother Doug towards the known union supporters identify them as being opposed to the certification. This means that there is an obvious polarization of loyalties between identifiable persons in the bargaining unit with only two employees who had not, as is their right, declared themselves one way or the other.

13. The Board, as already indicated, is satisfied, on the evidence, that a breach of the Act has been committed by the respondent. The Board is further satisfied that by reason of the fact that 50 per cent of the persons in the bargaining unit are members, the applicant has support adequate for collective bargaining. It remains to decide whether, in the circumstances, the conduct of the respondent has rendered it unlikely that the true wishes of the employees would be disclosed in a certification vote.

14. It is true that in a small unit the risk of disclosure must always be present and the smaller the unit the greater the risk, particularly where, as here, detectable sympathies insofar as polarity are obvious. That, in the absence of employer misconduct will not deter the holding of the vote. In the present situation, however, the conduct of the employer could not do other than adversely affect, at the very least, the non-committed members of the bargaining unit because of the probability, in the small and polarized unit, of disclosure of such a choice following the counting of the ballots. In addition, when the obvious channel of communication existing between the family members is considered in conjunction with the foregoing, the conduct of the respondent renders it extremely unlikely that a vote would disclose the true wishes of the employees.

15. The Board therefore directs that a certificate issue to the applicant for the bargaining unit described in paragraph 4 hereof.

0310-77-U Graphic Arts International Union, Local 28-B, (Complainant), v. Bruce Henderson Limited; Council of Printing Industries of Canada, (Respondents).

Section 79 – Duty to Bargain in Good Faith – Whether employer member of nonaccredited association is permitted to revoke authority to bargain immediately prior to signing of agreement – Whether bargaining in good faith – Whether bound by collective agreement

BEFORE: A. L. Haladner, Vice-Chairman, and Board Members M. J. Fenwick and F. W. Murray.

APPEARANCES: Harold F. Caley, Charles Buhler and Frank O'Reilly for the complainant; Walter R. Stevenson and Robert Leslie for Bruce Henderson Limited; Colin Morley, Corrine Murray and Edwin C. Caldwell for the Council of Printing Industries of Canada.

DECISION OF THE BOARD: August 4, 1977.

1. This is a complaint brought under section 79 of The Labour Relations Act. The complainant seeks a declaration from the Board that Bruce Henderson Limited (Henderson) is bound by the collective agreement between itself and the Council of Printing Industries of Canada (the Council) entered into on April 25, 1977 as well as an order requiring Henderson to sign the collective agreement and put into effect its terms. In the alternative, the complainant requests that the Board issue an order directing Henderson to bargain in good faith.

2. Because the complaint alleged no violation of the Act by the Council, and because the relief sought could not in any way have affected the Council's legal rights, the Council has been deleted as a respondent at the request of its counsel.

3. The Board's hearing into this matter proceeded by way of an agreed statement of facts. There were no witnesses called. The Board considers the following facts relevant:

- i) A collective agreement between the complainant and the Council was to expire on December 31, 1976. Henderson was a member of the Council bound by that collective agreement.
- ii) By letter dated October 8, 1976, the complainant gave notice to bargain to the Council, and to each of the forty-five members of the Council, including Henderson, bound by the collective agreement. The letter read:

"Dear Sir:

Re: Notice of Desire to Negotiate

We hereby give notice of desire to negotiate a new or amended Agreement, in accordance with Article 48 – Termination, of the current Agreement, effective January 1, 1976.

The current Agreement terms were established through negotiations with the Council of Printing Industries of Canada on behalf of member companies comprising a majority in the industry. We are currently advising the C.P.I. of our desire to commence negotiations.

In order to facilitate proceedings on this matter we require an early indication of your intentions:

- (i) Will your Company be represented by the Council of Printing Industries? and/or
- (ii) Will your Company be governed by the settlement reached with the Council of Printing Industries?

Your co-operation by giving this Notice immediate attention and response will be greatly appreciated.

Yours very truly,

C. Buhler,

President."

- iii) On October 8, 1976, the Council acknowledged receipt of the complainant's letter giving notice to bargain. Henderson did not reply to the complainant's letter.
- iv) On or about November 11, 1976 the Council gave to the complainant a list of employers on whose behalf the Council was authorized to negotiate amendments to the existing collective agreement. Henderson was among the thirty-three member employers included in that list.
- v) On March 21, 1977, the complainant was advised that the Minister of Labour had decided not to appoint a Board of Conciliation.
- vi) On or about April 13th, the complainant and the Council reached an oral agreement on a Memorandum of Settlement.
- vii) On April 20th, the Council mailed the proposed terms of settlement to each of its members, including Henderson, on whose behalf it was authorized to bargain.
- viii) On April 22nd, at approximately 11.30 a.m., the complainant and the Council signed a Memorandum of Terms of Settlement. Henderson was included in the list of signatory employers of the Council, of which there were then thirty-one. In the Memorandum of Terms of Settlement, it was agreed that "the (complainant) and the (Council) negotiating committees (would) recommend the terms of settlement to their respective members" and that "the

proposed terms of settlement (would) not constitute a collective agreement until ratified by both parties".

- ix) At approximately 3:00 p.m. on April 22nd, the complainant received a telephone call from the Council advising that Henderson had revoked its authorization for the Council to represent it in negotiating a collective agreement with the complainant. This call was subsequently confirmed by a letter dated April 22nd, and received by the complainant in the late afternoon of that same April 22nd.
- x) On April 24th, the membership of the complainant ratified the Memorandum of Terms of Settlement. On April 25th, the Memorandum was ratified by the Council, and it thus became a collective agreement. Ratification took place in accordance with the by-laws of the Council which required a majority of those members who had not revoked their authorization to the Council to vote in favour of accepting the proposed collective agreement.
- xi) A formal Memorandum of Agreement was signed by the Council and the complainant on April 29th. Henderson was not among the thirty signatories to the Memorandum of Agreement.
- xii) On May 4th, the complainant wrote the following letter to Henderson:

"Dear Mr. Leslie:

We have been unable to confirm your intentions with respect to contract renewal. Therefore, be advised that unless a settlement is reached within one (1) week from today, by May 10, 1977, we will consider ourselves free to exercise the options open to us in this matter.

Yours truly,

C. Buhler,

President."

- xiii) On May 6th, Henderson, through its solicitors, replied as follows:

"Dear Sirs:

We are acting for Bruce Henderson Limited and have been handed your letter to Mr. Leslie of May 4, 1977.

We understand as well that you have been advising certain of the employees of that Company that they are going to be in a position to go on strike within the next few days. We would suggest

that this is hardly the atmosphere in which to commence bargaining.

As Mr. Leslie has advised you, he has not had much experience in negotiating a collective agreement and he has therefore asked us to assist him if we can, and you may rest assured that the Company is prepared to proceed at this time to attempt to bargain an applicable collective agreement.

We have asked Mr. Leslie to provide to us a comprehensive list of the areas where it is felt that the agreement must be changed to ensure that the Company's operation remains a viable one and we would ask that you provide to us a memorandum or statement of some sort of the Local's position with respect to proposed amendments to the agreement.

Perhaps you might as well contact the writer at your convenience and arrange a time for a meeting to see if we can at least define the areas to be negotiated.

In the meantime we would suggest that if the employees involved are to be approached, they should be given proper information as to the situation under the Labour Relations Act.

Yours very truly."

- xiv) Prior to April 22nd, Henderson had negotiated through the Council, seven consecutive collective agreements with the complainant.

4. This case raises two questions of importance for the practice of employer organization bargaining under The Labour Relations Act. The first question is whether a member of an employers' organization which has authorized the organization to bargain on its behalf can withdraw from the bargaining process after a tentative agreement has been reached but before a binding collective agreement has been entered into. The second question, which need arise only if the first is answered in the affirmative, is whether an employer who does this violates its statutory duty to bargain in good faith.

5. Counsel for the complainant argued strenuously that it would not be in the interests of good labour relations to allow a member of an employers' organization to opt out of organization bargaining after a tentative agreement with a trade union had been reached. From this premise, he attempted to demonstrate by a rather ingenious construction of the Statute and the jurisprudence that the Legislature has enacted this policy into law. We need not elaborate upon the details of counsel's argument. Suffice it to say that it misconceives the policy of the Act with respect to multi-employer bargaining.

6. Unlike the legislation in other jurisdictions, such as the British Columbia or Canada Labour Codes, The Ontario Labour Relations Act does not provide for accreditation of employers' associations as exclusive bargaining agents for employers operating outside of the construction industry. By contrast with these other jurisdictions, multi-employer bar-

gaining in the industrial sector of the Province is based almost exclusively on the concept of voluntarism. Under The Labour Relations Act, an individual employer not only has a free choice about whether it will bargain through an employers' organization, but once it decides that it is in its best interest to have such an organization bargain on its behalf, it is permitted to resign from the organization or revoke its authorization to bargain even after negotiations for a collective agreement have begun. The only limitation on a member employer's freedom is that it cannot avoid being bound by a collective agreement that has been entered into on its behalf. The policy of the Act is that while an individual member who is dissatisfied with either the quality of the representation it has been receiving or the progress of a particular set of negotiations, should be able to return to single employer bargaining at any time during the bargaining process, the participants must be assured that this cannot occur after a binding collective agreement has been concluded; otherwise, employer organization bargaining would be an exercise in futility with no incentive for participation in the first place.

7. This policy, which may be described as compelling stability in collective agreements but not stability in bargaining is embodied in section 43. Section 43(1) establishes the binding effect of collective agreements which result from multi-employer bargaining on members of the employers' organization on whose behalf the organization bargained. It provides as follows:

A collective agreement between an employers' organization and a trade union or council of trade unions is, subject to and for the purposes of this Act, binding upon the employers' organization and each person who was a member of the employers' organization at the time the agreement was entered into and on whose behalf the employers' organization bargained with the trade union or council of trade unions as if it was made between each of such persons and the trade union or council of trade unions and upon the employees of the bargaining unit defined in the agreement, and, if any such person ceases to be a member of the employers' organization during the term of operation of the agreement, he shall, for the remainder of the term of operation of the agreement, be deemed to be a party to a like agreement with the trade union or council of trade unions.

8. Section 43(2) defines the circumstances in which an employers' organization can be said to have bargained on behalf of a member employer, such that the member will be bound by the resulting collective agreement. Put in the language of the Supreme Court of Ontario in the *Fullerton-Weston Publishing Ltd.* case, 71 CLLC, ¶14,083, section 43(2) provides how and when an employer can avoid being bound by a collective agreement which is being negotiated on its behalf. It states:

When an employers' organization commences to bargain with a trade union or council of trade unions, it shall deliver to the trade union, or council of trade unions a list of the names of the employers on whose behalf it is bargaining and, in default of so doing, it shall be deemed to bargain for all members of the employers' organization for whose employees the trade union or

council of trade unions is entitled to bargain and to make a collective agreement at that time, except an employer who, either by himself or through the employers' organization, has notified the trade union or council of trade unions in writing before the agreement was entered into that he will not be bound by a collective agreement between the employers' organization and the trade union or council of trade unions.

9. In this case, Henderson did notify the trade union in writing before the agreement was entered into that it would not be bound, and accordingly, the collective agreement between the Council and the complainant entered into on April 25, 1977 is not binding on Henderson.

10. In deciding whether Henderson's conduct constitutes a violation of its duty to bargain in good faith, we begin from the premise that an employer cannot use the freedom provided by section 43 to avoid its obligation under section 14 any more than an employer can use the freedom provided by section 70 for such a purpose (as was held in *DeVilbiss (Canada) Limited* [1976] OLRB Rep. Mar. 49). The freedom provided by section 43 must be integrated with the obligation imposed by section 14. Thus an employer that authorizes an employers' organization to bargain on its behalf so as to avoid its obligation to sit down and negotiate a collective agreement with a trade union breaches its duty to bargain in good faith. Such conduct is tantamount to a refusal to recognize the status of the bargaining agent for collective bargaining purposes.

11. That is not to say, however, that every employer that gives a late notice to a trade union pursuant to section 43(2) will be found to have contravened section 14. While the Board will view with suspicion the giving of a section 43(2) notice at the concluding stages of the bargaining process, particularly when, as here, it was given after a tentative agreement between the employers' organization and the trade union had been reached, we are not prepared to lay down a blanket rule holding all employers who give notice at this time in violation of section 14. That was the position urged upon us by the complainant.

12. As with any other conduct which is alleged to evidence the presence of bad faith bargaining, the significance of a late notice under section 43(2) must always be assessed in the context of the particular circumstances in which it occurred. In some cases, the giving of notice after a tentative agreement has been reached may well give rise to an inference that the employer has been using the freedom provided by section 43 to shelter behind an employers' organization and thereby avoid its obligation to bargain. In other cases, however, the employer may have been prepared from the outset to enter into a collective agreement, but may find itself unable to agree to a particular provision or group of provisions which it had not anticipated would be included in the collective agreement and which give(s) insufficient recognition of its special circumstances. If the Board were to hold an employer in this type of situation in violation of section 14, it would be interpreting the section so as to impose upon the parties a framework for collective bargaining which the Legislature has not seen fit to establish.

13. The Board has already dealt with a case in which an employer could be said to have bargained through an employers' organization without a *bona fide* intention of concluding a collective agreement. In *Milnes Fuel Oil Limited*, (Board File No. 1461-76-U, Jan-

uary 26, 1977, unreported) the respondent employer bargained through an employers' organization to a tentative agreement and then applied for conciliation, thus indicating an intention to return to single employer bargaining. This conduct occurred against the background of a pattern of activity which the complainant alleged was evidence of an attempt by the employer to unlawfully rid itself of the trade union and which the Board concluded was in violation of sections 56, 58(a), (b), and (c), 59(1), 61 and 70 of The Labour Relations Act, and in respect of which the Board issued an Order directing the employer to cease and desist from all activities designed to defeat the rights of the union and/or the employees under the Act. Because the employer in *Milnes* had not notified the union pursuant to section 43(2) that it would not be bound by the collective agreement, the Board did not find the employer in violation of section 14. However, it is clear from a reading of the decision that the Board would have found bad faith bargaining had such notice been delivered.

14. The Board is not prepared on the basis of the evidence before it to draw the inference that Henderson had hidden behind the Council to avoid its obligation to bargain with the complainant. Nor are we prepared to conclude that Henderson continued under the Council's umbrella after it learned that the new collective agreement between the Council and the complainant would contain provisions to which it could not agree. This latter type of conduct would also, in our view, constitute a violation of section 14, since it would have needlessly forestalled the commencement of direct negotiations between the parties.

15. The evidence establishes that Henderson has negotiated seven consecutive collective agreements with the Council. Moreover, there is no evidence that it has engaged in anti-union activity of any kind. This is in vivid contrast to the situation which existed in *Milnes*.

16. The Board is concerned that Henderson's letter of May 6th, wherein it stated, among other things, that it wished to "commence bargaining", may reveal an intention on the part of Henderson to ignore completely the bargaining between the complainant and the Council, a course of conduct which would indeed leave Henderson's *bona fides* open to question. We prefer, however, to construe the letter as no more than an attempt on the part of Henderson's solicitors to prevent a resort to strike action by the complainant before the parties have had an opportunity to reach an agreement on those items of the collective agreement between the Council and the complainant which Henderson finds itself unable to accept.

17. Our conclusion is that Henderson is not bound by the collective agreement between the Council and the complainant entered into on April 25th, 1977 and that Henderson has not violated section 14 of The Labour Relations Act.

18. The complainant and Henderson must now meet and engage in direct negotiations with a view to concluding a collective agreement. These negotiations must take place against the background of the bargaining which has already taken place between the complainant and the Council, which, until its bargaining authority was revoked, was authorized to bargain on Henderson's behalf.

0397-77-M Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, (Applicant), v. **Collegiate Sports Ltd.**, and General Contractors' Section of The Toronto Construction Association, (Respondents).

Arbitration – Section 112a – Collective Agreement – Whether collective agreement exists – Whether purported signatory had authority to enter agreement – Whether grievance arbitrable

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. D. Bell.

APPEARANCES: Cameron Hillmer, Ed Stewart and Tony Grisolia appearing for the applicant; James Hassell, Gerald Fedchun and Lorne Tick appearing for Collegiate Sports Ltd.; no one appearing for The General Contractors' Section of The Toronto Construction Association.

DECISION OF VICE-CHAIRMAN R. A. FURNESS AND BOARD MEMBER J. D. BELL: AUGUST 8, 1977

1. The applicant has referred to the Board pursuant to Section 112a a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement for final and binding arbitration.
2. The name of one of the respondents appearing in the style of cause as "Collegiate Sports (Wholesale) Co. Ltd. and Collegiate Sports Ltd." is amended to read "Collegiate Sports Ltd."
3. The respondent Collegiate Sports Ltd. ("Collegiate") adopted the position that there was not a collective agreement between the applicant and itself and moreover that the applicant did not have bargaining rights for any of its employees. The applicant adopted the opposite position on both of these points.
4. The Board heard evidence from Edgar Stewart, the applicant's business agent; William Morris, who at all material times was the applicant's secretary-treasurer; Maureen Baxter, the applicant's secretary; John Mathers, Collegiate's vice-president at all material times; Lorne Tick, legal counsel for Collegiate at all material times; and from John Musso, an employee of Collegiate.
5. According to the applicant John Musso signed a collective agreement on behalf of Collegiate on April 3, 1974, and had the necessary authority to bind Collegiate with his signature. Collegiate's position is that Mr. Musso never had the authority to sign a collective agreement on its behalf and that he was induced to sign the purported collective agreement and another document under a complete misunderstanding as to the nature of the documents he was signing.

6. The Board heard the conflicting testimony of the applicant's witnesses on the one hand and the respondent's witnesses on the other. However, upon analysis of the evidence some of the areas of apparent conflict may be resolved. Thus Mrs. Baxter gave evidence regarding how she would prepare the necessary documents prior to the entering into a collec-

tive bargaining relationship with an employer. However, she testified that she had no recollection of the events which surrounded the signing of the purported collective agreement on April 3, 1974. Another example concerned the testimonies of William Morris and Lorne Tick. While Mr. Tick gave evidence of a meeting with Mr. Morris on June 12, 1974, and identified him at the hearing, Mr. Morris was not prepared to testify that he had not met Mr. Tick in his office on June 12, 1974. Mr. Morris testified that he did not recollect meeting Mr. Tick. With regard to the actual signing of the purported collective agreement on April 3, 1974, Mr. Musso remembered the events with far greater clarity than Mr. Stewart and Mr. Morris. After analysing the evidence of the witnesses the Board makes the findings set forth below.

7. During April of 1974, Collegiate was in the process of preparing one of its stores in Yorkdale Shopping Centre in Metropolitan Toronto. Collegiate was under the impression that in order to prepare the store at Yorkdale it was required to employ only union labour. John Musso is employed by Collegiate as a handyman. He is very versatile in that he changes the interior of Collegiate's stores for Fall and Winter, performs maintenance of various types, performs carpentry, plumbing, cement finishing and brickwork. His command of English is limited but it is adequate for his job. He does not read English with any degree of comprehension.

8. Prior to April 3, 1974, Mr. Musso telephoned the offices of the applicant and asked that Carpenters be sent to work for Collegiate in Yorkdale. He made this request on the direction of two of his supervisors, John Lennox and Danny Mahon. The applicant informed Mr. Musso that he had to sign a paper in order for the carpenters to work. To this end Mr. Musso presented himself at the applicant's office on or about April 3, 1974. He first met Mr. Stewart and then met Mr. Morris. At this point there was a complete breakdown in communication between Mr. Musso and these two officials of the applicant. The latter gave evidence that they explained to Mr. Musso that in order for Collegiate to obtain carpenters from the applicant it was necessary for Collegiate to sign a short form collective agreement and a trust document. Mr. Musso testified that he realized that he had to sign papers before the carpenters could be provided. However, he understood that he had to sign two papers and that the first was to obtain the carpenters and the second was because "if you don't pay you have to pay out of your own pocket". He gave evidence that at no time was he told he was signing an agreement.

9. While he was talking to Mr. Stewart, Mr. Musso telephoned and explained the situation to Mr. Mahon who told him to sign the papers. Mr. Stewart gave evidence he made a separate telephone call and spoke to a vice-president of Collegiate about Mr. Musso's authority to sign on its behalf. According to Mr. Stewart's testimony he was assured that the handyman could sign for Collegiate. Mr. Musso testified that Mr. Stewart did not make such a telephone call in his presence. Mr. Stewart could not recall the name of the vice-president and Mr. Mathers, who was Collegiate's only vice-president at the relevant time, informed the Board that he had never received a telephone call either from a representative of any carpenters' union or from a Mr. Stewart. At this point it should be mentioned that Mr. Stewart thought it strange that Mr. Musso had the authority to sign a collective agreement on behalf of Collegiate. He was unaware that Mr. Musso could neither read nor write English.

10. Mr. Musso gave evidence that he never had any authority to sign agreements for

Collegiate and that for purchases above five dollars in value he has to obtain permission from the store manager.

11. In addition to the complete breakdown in communication there are other discrepancies in the two versions of what happened on April 3, 1974. Mr. Musso stated that he signed two single sheets of paper and that these sheets were not stapled together. The short form collective agreement consists of two sheets of paper which are stapled together. The trust document was not produced in evidence. Mrs. Baxter informed the Board that the two sheets of short form collective agreement would have been stapled together while Mr. Stewart told the Board that the two sheets may not have been stapled together. Mr. Musso testified that he had not seen the first sheet of the short form collective agreement when he signed. Mrs. Baxter gave evidence that she would have typed in the heading on the short form collective agreement and that she obtains this information from a business card or directly from the person who signs the short form collective agreement and that she never obtains such information from a telephone directory. The heading reads: "Collegiate Sports (Wholesale) Co. Ltd., 1510 Warden Ave., Scarborough, Ont. 447-9115". Mr. Musso has business cards which have remained unchanged since he received them prior to April of 1974. He still has most of these business cards at home and was not sure whether or not he gave his card to the applicant or its secretary. However, his business card reads: "John Musso Collegiate Sports 2275 Midland Avenue, Scarborough, Ont. M1P 3E7 Tel: 292-2215". Mrs. Baxter certainly did not obtain information for the heading from Mr. Musso's card. Where did she obtain the information? Neither the applicant nor Collegiate could hazard even a hypothesis on this point. The origin of the heading becomes an enigma within a mystery when we consider that approximately one year prior to April of 1974 the corporate name of Collegiate Sports (Wholesale) Co. Ltd." was changed to "Collegiate Sports Ltd."

12. Collegiate's contributions to the applicant's welfare trust fund report for May of 1974 was filed in evidence. Mr. Stewart testified that the report could not be accurately completed unless Collegiate obtained the rates from the collective agreement. However, the short form collective agreement does not refer to rates and there was no evidence that the terms of the collective agreement between the applicant and The General Contractors's Section of The Toronto Construction Association were communicated to Collegiate. However, Mrs. Baxter testified that it was possible to accurately complete the report because she had actually written in the rates on the blank report prior to its completion. There was no evidence concerning how Collegiate received the report for completion. Mr. Musso was adamant that he had taken nothing with him when he left the applicant's office, Mr. Stewart and Mr. Morris were not sure whether he had taken a copy of the short form collective agreement with him.

13. Allowance must be made for the vagaries of memory over a period of more than three years. We found applicant's witnesses to be given to generalities and in our view they recalled very little of the meeting with Mr. Musso. It is possible that the applicant's witnesses confused events from other signings of short form collective agreements with the incident involving Mr. Musso. We are of the opinion that the first sheet of the short form collective agreement was not attached to the second sheet when it was signed by Mr. Musso and that the heading on the first sheet was prepared subsequent to the signing on or about April 3, 1974, from information acquired from unknown sources. In fact the date of April 3 was itself altered from another date.

14. Having regard to the evidence before us, we find that Mr. Musso had neither the express nor implied authority to enter into a collective agreement on behalf of Collegiate. We further find that Mr. Musso did not understand that he was signing a collective agreement but rather believed that he was signing to obtain carpenters from the applicant and because "if you don't pay you have to pay out of your own pocket". We also further find that at the time Mr. Musso signed the short form collective agreement the first sheet was absent. We further find that Mr. Tick and Collegiate first received a copy of the short form collective agreement and first became aware of its existence on June 11, 1974, and that immediately upon its receipt Collegiate investigated the purported execution of the short form collective agreement and repudiated this document in a letter dated June 11, 1974, which was delivered to Mr. Morris on June 12, 1974.

15. There remains the question of Collegiate seeking out the applicant's carpenters, paying the current hourly rate and contributing to the applicant's welfare trust fund. It appears to the Board that Collegiate was under the impression that it was required to employ only union labour and that once it had obtained the carpenters it lived up to the applicant's rates and fringe benefits. Such compliance with the terms of a collective agreement without actually being bound by it is by no means uncommon in the construction industry. Collegiate did not desire to enter into a collective agreement with the applicant.

16. Mr. Musso had neither the express nor implied authority to enter into a collective agreement. In these circumstances was there any apparent authority for Mr. Musso to bind Collegiate? As the Board pointed out in the *Inspiration Limited* case, [1967] OLRB REP. 561, 565, apparent authority to sign a collective agreement on behalf of Collegiate is dependent on two factors, namely, whether Mr. Musso held himself out as having such authority and whether Mr. Stewart and Mr. Morris reasonably believed that he had such authority. We find that Mr. Musso neither understood that he was signing a collective agreement nor held himself out as having such authority. Mr. Stewart thought it strange that Mr. Musso had such authority and we find that no one from Collegiate ever led Mr. Stewart to believe that Mr. Musso had such authority.

17. Counsel for the applicant relied on the *G. A. Baert Construction (1964) Ltd.* case [1971] OLRB REP. 766 and on the unreported decision of an arbitrator in *A. F. Forming Company Limited*. The facts in these two cases are materially different from the instant case. In the former case the Board held that there was an express holding out of the authority of an employee to sign a collective agreement. In the latter case an original signed collective agreement was in the possession of the employer. The employer made contributions to a welfare trust fund and to the vacation pay trust fund at the rates required by the collective agreement. In the instant case Collegiate was not in possession of the purported collective agreement until after the job was completed and upon being made aware of the purported collective agreement *immediately* communicated its position to the applicant that the purported collective agreement was invalid. The contributions under the applicant's welfare trust fund were not based upon Collegiate's reference to the purported collective agreement since the contributions were based upon figures which were written down by Mrs. Baxter. Collegiate did not make payments to the applicant with respect to vacation pay and this indicates that Collegiate was unaware of the provisions of the purported collective agreement in this regard.

18. We find that Collegiate intended only to pay the union scale for using the

applicant's carpenters at Yorkdale and not to either sign a collective agreement or enter into a collective bargaining relationship with the applicant. For the foregoing reasons we find that Collegiate is neither a party to a collective agreement with the applicant nor does it have a collective bargaining relationship with the applicant. It follows that the grievance which has been filed under a purported collective agreement is not arbitrable and accordingly this referral of grievance to arbitration is dismissed.

DECISION OF BOARD MEMBER D. B. ARCHER:

The facts as set out by the majority are accurate. However, I must disagree with their conclusion. Collegiate did seek out the union in order to obtain carpenters for the Yorkdale job. The union made it plain to Mr. Musso who was in my opinion, acting on behalf of the company, that it would be necessary to sign a short form agreement. Mr. Musso phoned Mr. McMahon and received permission to sign. Stewart called the company contacting someone who identified himself as a vice president. Stewart questioned Musso's right to sign and was told it was okay. Mr. Musso despite his appearance and lack of familiarity with the English language produced a business card identifying him as attached to Collegiate Sports.

The company then proceeded to pay the union wages and paid into the welfare trust fund the amount stipulated by the union. It was only when a new store was in the process of opening and carpenters were needed that the validity of the contract was challenged by the company. In all the circumstances of this case, I would find that a valid collective agreement was entered into by Collegiate Sports.

0004-77-U and 2200-76-U Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant), v. **Consumers Distributing Company Limited** and Oil & Gas Technicians, Service, Domestic and General Workers Union, Local 1267, L.I.U.N.A., (Respondents).

Section 79 – Discharge for Union Activity – Whether corporate reorganization resulting in layoff of union supporters motivated by anti-union animus

BEFORE: A. L. Haladner, Vice-Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: Douglas J. Wray and Al LeFort for the applicant; D. L. Brisbin and A. Gauthier for the respondents.

DECISION OF THE BOARD: August 9, 1977

1. These matters consist of two complaints brought under Section 79 of The Labour Relations Act seeking remedial relief from the Board. Both complaints relate to conduct which occurred during the complainant union's campaign to displace another union as the bargaining agent for the employees of the respondent, a distributor of consumer goods. The first complaint alleges that the respondent has violated sections 58, 60 and 61 of the Act by setting up a "dead end" department in a satellite warehouse into which the chief organizers and certain other supporters of the complainant were transferred and then laid off. The second complaint relates to the lay-off of the wife of one of the chief organizers and alleges that this lay-off was the result of the organizational efforts of her husband and is thus in violation also of sections 56, 58, and 61. The two complaints were joined so that the evidence common to both could be heard at the same time.

II

2. On August 21, 1974, the Oil and Gas Technicians, Service, Domestic and General Workers Union, Local 1267 (the Labourers) was certified for an all-employee unit of the respondent at its warehouse in Mississauga, exclusive of office and sales staff and part-time employees. A collective agreement between the respondent and the Labourers, effective October 1, 1974 to February 28, 1977, was entered into on October 1, 1974. The recognition clause of the collective agreement reads:

"The Company recognizes the Union as the exclusive bargaining agent for all employees of the Company working at or out of the Distribution Centre at 6700 Northwest Drive, Mississauga, and the satellite warehouses of the aforesaid Distribution Centre, save and except foremen, persons above the rank of foreman, office and sales staff, seasonal employees, students, and persons regularly employed for not more than twenty-four (24) hours per week."

3. The complainant commenced a drive to organize the employees of the respondent in early October of 1976. This drive culminated in an application for certification filed with the Board on January 19, 1977. The initial contact with the complainant was made by Joe Gurha. The evidence establishes that Gurha called Al LeFort, a full-time staff member of the complainant, during the first week of October, 1976 and indicated an interest in bringing the complainant in to replace the Labourers. Shortly thereafter, LeFort met with Gurha and R. Patel at Gurha's apartment. The next day Gurha called Bill Palmer and John Persaud. A few days later, LeFort met with Gurha, Palmer, Persaud and another employee, D. Mohni, at Palmer's home. Following these meetings, Gurha, Palmer and Persaud began drumming up support for the complainant. Gurha and Palmer gave evidence, which the Board accepts, that by late October, the employees of the respondent were all talking about the complainant.

4. Gurha, Palmer and Persaud were the chief organizers on behalf of the complainant. In the first week of November, 1976, they were joined by two other union sympathizers - Kelvin Williams and, to a lesser extent, Keith Ashley, and together they began signing up employees.

5. The evidence establishes that Gurha, Palmer, Persaud and Ashley had been involved in an earlier campaign to organize for the Upholsterers union. This campaign, which

took place between July and September of 1976, reached the stage of card solicitation, but was then aborted, apparently at the instance of the employees themselves.

III

6. On November 1, 1976, Bob Weaver, the respondent's director of warehousing and transportation sent the following letter to J. R. McPherson, the Secretary Treasurer of the Labourers:

"Dear Mr. McPherson:

As of this date we have established a satelite [sic] warehouse at 2280 Drew Road, Mississauga, Ontario.

Operating within this warehouse, is a department that is re-sorting damaged merchandise. This department will be named "A.B.C. Re-Sort".

Under the terms of our collective agreement please be advised of the existance [sic] of the above mentioned new department as of this date.

Yours sincerely."

Under the collective agreement between the respondent and the Labourers, the establishment of a new department has the effect of transferring a transferred employee's seniority after thirty days. The relevant provision of the collective agreement is article 7.10. It reads:

"When the Company transfers an employee to a department other than the department in which he holds his seniority, the employee shall retain his seniority in his old department for thirty (30) days. After such thirty (30) days, he shall lose his seniority in his old department and shall have said seniority transferred to his old department."*

* The final reference in Article 7.10 to "old" department is obviously a typographical error. The parties were not in dispute at the hearing that the effect of Article 7.10 is such that the final reference should read "new" department.

7. On or about November 1, 1976, Joe Gurha, William Palmer, John Persaud, Keith Ashley, Sechan Kassie and Sham Ladha were transferred, together with 5 other bargaining unit employees, to the new department at Drew Road. Prior to their transfers, none of the named employees had ever worked with "ABC" merchandise.

8. Gurha commenced employment with the respondent on September 30, 1974. At the time of his transfer, he was working in the respondent's internal audit department. Gurha gave evidence, which was neither challenged on cross-examination nor contradicted by the evidence of the respondent, that he was told by the respondent's receiving foreman that he would be at Drew Road for just one day.

9. Palmer commenced employment with the respondent on November 11, 1974. At the time of his transfer, he was working in the internal audit department. Palmer gave evi-

dence, also unchallenged and uncontradicted, that he was told by his supervisor, Maurice Elliot, that his transfer to Drew Road might be a couple of days.

10. Persaud commenced employment with the respondent on April 28, 1975. At the time of his transfer, he was working in the shipping department. Persaud gave evidence, also unchallenged and uncontradicted, that he was told by his foreman that he was to report to Drew Road for a temporary period of time, specifically a couple of days or a week.

11. Ashley commenced employment with the respondent on April 21, 1974. At the time of his transfer, he was working in the shipping department. Ashley gave evidence, also unchallenged and uncontradicted, that he was told by his foreman, Noam Brown, that he would be working at Drew Road for a day. Ashley testified further that he was subsequently told by Brown that Brown understood he was organizing for the Upholsterers, "that he was a big disgrace to the Company organizing with the rest of the guys," and that was why he had been sent to Drew Road. This evidence was also unchallenged and uncontradicted.

12. Kassie commenced employment with the respondent on March 10, 1975. At the time of his transfer he was working in the shipping department as a forklift operator. Kassie's evidence, also unchallenged and uncontradicted, was that he was told by his foreman, Jim Johnson, to go to Drew Road for two or three days.

13. Ladha commenced employment with the respondent on March 15, 1973. Ladha is no longer an employee of the respondent, and did not give evidence before the Board.

14. Between November 15th and November 19th, Kelvin Williams, Mike Williams, S. Sattar, Ken Robinson, L. Archibald, H. Hansraj, A. Falloon, V. Gregory, and J. Eyzaguirre were transferred to the ABC re-sort department at Drew Road. Prior to their transfers, none of these employees, with the exception of Hansraj, had ever worked with ABC merchandise. The evidence establishes that the employees were all supporters of the complainant. The employees gave evidence, also uncontradicted, that they were told that their transfers to Drew Road would be temporary. Kelvin Williams testified he was told by Cyril Bown, the supervisor of the new department, that his transfer would only be for a few days because he was a good worker. Hansraj testified he was told by his foreman, Ray McLean, that since he was fairly experienced in ABC work he would be temporarily transferred to Drew Road and would be back at the main warehouse by Christmas. Robinson testified he was told by Brian Wicks, the manager of receiving, that he would work at Drew Road for a couple of days, up to a week, and would then be recalled to perform his normal duties. Falloon testified he was told he would only be going to Drew Road for a couple of days. Sattar testified he was told he would be transferred for a short while. Archibald testified he was told by Bill McGarrel, the manager of shipping, that he would only be at Drew Road for a couple of days.

15. Between December 15 and December 22, 1976, the respondent laid off nearly 300 of the 445 employees employed at its main warehouse on Northwest Drive. Included in these lay-offs were the respondent's total complement of 150 seasonal employees, 15 of the 45 employees in the office and about 130 of the approximately 250 employees falling within the bargaining unit described in the collective agreement. The bargaining unit employees were laid off on the basis of departmental seniority.

16. On December 21, 1976, the respondent laid off all the employees in the Drew Road warehouse. These lay-offs comprised the 15 employees named in paragraphs 7 and 14 (the "grievors"). The other 5 bargaining unit employees transferred along with the grievors on November 1st had all been recalled to the Northwest Drive warehouse prior to December 21st.

17. The respondent began recalling employees to its Northwest Drive warehouse in January of 1977. By February 17th and 18th, the days of the pre-hearing representation vote between the complainant and the Labourers, all of the laid-off employees had been recalled except for the 15 grievors. The evidence establishes that a good number of the employees recalled to the Northwest Drive warehouse had less seniority than the grievors.

18. On February 19th, Palmer, Falloon, Sattar and Ladha were recalled to clear out the portion of the Drew Road warehouse occupied by the ABC re-sort department (approximately 4,000 sq. ft.). On February 25th, the 3 employees that reported for work, namely, Palmer, Sattar and Falloon were again laid off.

19. On April 25th, two days before the Board's initial hearing into this complaint, the grievors were recalled to the Drew Road warehouse, except for Eyzaquire, who had earlier resigned and Ladha, who had failed to report when recalled on February 19th. The grievors were all recalled to the ABC re-sort department.

20. At about the time of the grievors' recall on April 25th, the respondent's service department was moved from the Northwest Drive warehouse to the Drew Road warehouse.

21. The respondent currently leases the entire warehouse at Drew Road (approximately 20,000 sq.ft.) The majority of the space in that warehouse is occupied by the service department. The Board was informed that the ABC re-sort department now occupies about $\frac{1}{4}$ th of the Drew Road warehouse.

22. The evidence establishes that the grievors are now splitting their time between the service and the ABC re-sort department, the department in which their seniority resides. When working in the service department, the grievors do the regular work of that department. Specifically, they receive damaged merchandise back from the stores, sort it, process it, pack it, and send it back to the manufacturer for repair or replacement. When working in the ABC re-sort department, the grievors sort and pack ABC merchandise.

23. In contrast to the employees in the ABC re-sort department, the employees presently employed in the service department do not work in both departments. They work only in service. It should be noted here that prior to November, 1976, the ABC re-sort function was performed by the employees in the service department which was then located in the main warehouse at Northwest Drive.

24. Bob Weaver, the director of warehousing at the time of the establishment of the Drew Road warehouse and Andy Gauthier, the present director of warehousing (as of January 3, 1977) and the then manager of warehouse operations, were the only two witnesses called by the respondent in respect of complaint number one.

25. Weaver and Gauthier gave evidence that the Drew Road warehouse was estab-

lished because the main warehouse on Northwest Drive could not accommodate the volume of distressed or ABC merchandise which it was then receiving back from its retail outlets. Their evidence was that the retail stores were not accepting any new merchandise, and thus the space which had previously been used for ABC re-sorting was needed to store new merchandise. In addition, there was a back-log of unsorted ABC merchandise at Northwest Drive. Weaver stated he first became aware of the problem around October 20, 1976 and that space in the Drew Road warehouse was obtained shortly thereafter. This space was obtained by means of a leasing arrangement with the owner. Under the original terms of the lease, the respondent was permitted to occupy approximately 4,000 sq. ft. of the Drew Road premises for a period of three months, commencing November 1, 1976. There was provision in the lease for an extension for a further term of one month, provided the lessor was notified of the respondent's requirements thirty days in advance of the expiry date. As it turned out, this option was exercised, and the lease was extended to the end of February, 1977.

26. Gauthier testified that the purpose of the February 19th recall of Palmer, Sattar, Falloon and Ladha was to allow the Drew Road premises to be cleaned out in order that it could be vacated pursuant to the terms of the lease.

27. In giving his evidence-in-chief, Weaver was able to account for twenty-two specific uses by the respondent of satellite warehouses in the past. However, he acknowledged under cross-examination that a new department had never been established in a satellite warehouse prior to November 1, 1976.

28. Weaver testified that the employees transferred to the Drew Road warehouse came from numerous of the ten departments of the respondent and that they were selected without regard to their seniority. His evidence was that the basis of selection was that of availability and the type of functions required. In the latter connection, Weaver testified that the Drew Road warehouse required a forklift operator, a loader, maintenance people and people familiar with the respondent's merchandise. Weaver stated, however, that he took no part in the selection of specific individuals. His evidence was that he simply instructed those reporting to him, including Gauthier, that about a dozen people were required and that the people whose function was not absolutely necessary should go. Gauthier also stated that he took no part in the actual selection of employees transferred to the Drew Road warehouse. His evidence was that he instructed the four department managers reporting to him, the managers of shipping, receiving, stock control and warehousing that 10 people were required and that each manager should provide the manpower he could spare.

29. Weaver and Gauthier testified that they took no part in the decision to transfer the 5 bargaining unit employees transferred along with the grievors back to the Northwest Drive warehouse.

30. The witnesses gave evidence that the mass lay-offs which afflicted the main warehouse in December of 1976 were the result of the respondent's failure to realize its anticipated volume of sales. They testified that shipping was unnecessary for the period of the lay-offs since the stores had an excess of merchandise on hand.

31. The Board was informed that the lay-off of the 15 complainants at Drew Road was also the result of the respondent's poor sales performance. Gauthier testified that the

employees at Drew Road were laid off because the stores were not capable of accepting the volume of ABC merchandise which had been generated.

32. Gauthier testified that no ABC merchandise was processed at either the Northwest Drive or the Drew Road warehouses from December 21, 1976 to April 25, 1977 – the period during which the grievors were laid off. However, the complainant led evidence through Ray Heslop, a foreman in the service department, that some ABC merchandise was processed in the Northwest Drive warehouse by service department employees from Christmas, 1976 until about the end of April, 1977 – the time at which the service department was transferred to Drew Road. Heslop's evidence was confirmed by the respondent's records. These records also indicate that on February 16th, 17th and 18th, ABC merchandise was processed at the Drew Road warehouse by persons other than the grievors. William Palmer testified that when he was recalled on February 19th to clear out the Drew Road warehouse, he found the merchandise in a state different than when he was laid off on December 21st.

33. Under cross-examination, Gauthier testified that 15 or 20 employees were hired off the street to work in the shipping department at Northwest Drive in January and February of 1977. He also testified that the respondent had no plans at that time to re-lease the Drew Road warehouse and that there was, therefore, no prospect of the grievors being recalled. He testified further that no consideration was given to transferring the grievors back to shipping, even though some of them had over two years experience in that department. In this regard, Ken Robinson testified that he approached Brian Wicks in early February after learning of the new hirings and asked about the possibility of getting a job in shipping. Robinson's evidence, which was not contradicted, was that he was told by Wicks at that time that he had been permanently transferred to the ABC re-sort department. Robinson then stated that was the first time he had heard this, to which Wicks replied "that's the way it is". Robinson then approached Gauthier who told him there was nothing he (Gauthier) could do since Robinson was transferred to ABC and "at the present time there was no work going on in there". Robinson would, therefore, just have to wait.

34.. Gauthier testified that the respondent leased the entire Drew Road warehouse effective May 1, 1977 and that the decision to recall the grievors was made on April 25th.

35. Both Weaver and Gauthier gave evidence that they were unaware of the complainant's organizing campaign at the time of the establishment of the ABC re-sort department at Drew Road. Gauthier testified that he first became aware of union activity sometime in November, 1976, but that he did not know at that time which union was involved. Weaver testified that he heard in the latter part of October that the Upholsterers union was attempting to sign employees but that he did not become aware of the complainant until the latter part of November.

36. The Board heard evidence from Prit Paun Singh, a long-service employee of the respondent, who was not laid off in December of 1976, that he was told by Weaver on December 20, 1976, during the course of a discussion on another matter, that Weaver would fire anybody who was trying to get the Teamsters in. Singh also testified that Weaver told him the Teamsters were working for the Company in Washington, D.C. and that the Company had a very bad experience there. Weaver acknowledged having a discussion with Singh on December 20th and that he was aware the Teamsters represented the respondent in the United States. He acknowledged further that he might have mentioned this to Singh.

He denied, however, saying he would fire anybody if the Teamsters got in or words to that effect. Given the basis upon which the Board has disposed of these complaints, it is unnecessary for us to make any finding as to whether Weaver spoke the words in question.

IV

37. In January of 1977, the respondent laid off 2 of the 5 regular computer terminal operators employed in its data communications department. Irene Gurha, the wife of Joe Gurha, was one of the two terminal operators laid off.

38. Mrs. Gurha commenced employment with the respondent in October of 1973 as a terminal operator. In October or November of 1974, she was promoted to a lead hand with supervisory responsibilities over the other terminal operators. In August of 1976, Mrs. Gurha was reclassified as a terminal operator without loss of pay. The evidence establishes that at the time of her lay-off, Mrs. Gurha was not only the most senior of the 5 terminal operators working for the respondent, but also that she was the highest paid. The evidence further establishes that she was involved in the training of the 3 terminal operators who were laid off in January of 1977. The other terminal operator laid off with Gurha had been with the respondent for only two or three weeks.

39. John Burden, the manager of stock control and data communications and Dominic Piccolo, Gurha's immediate supervisor, were called to explain the reasons for her lay-off. Burden and Piccolo testified that the respondent's policy on lay-offs in respect of non-bargaining unit employees such as terminal operators is that seniority governs only when qualifications and performance are equal.

40. The primary reason given by Burden for Gurha's lay-off was that complaints had been received from persons in other departments that Gurha was difficult to communicate with and that she was insensitive to the other departments' needs. Specifically, Burden testified that Gurha's work was not returned in the same form as given; and that when she was assigned specific functions, they were not carried out in the sequence required. Burden also made reference to a performance review form prepared prior to Gurha's reclassification which, in the Board's view, is of no assistance to the respondent. Burden testified that the decision to lay-off was his, but that it had been made after discussing the situation with Piccolo.

41. Burden testified that Gurha's relationship to Joe Gurha was not the reason for her lay-off; and further, that at the time of her lay-off, he was unaware of Joe's involvement with the complainant.

42. In giving his evidence in chief, Piccolo delivered a litany of complaints about Mrs. Gurha's performance. His evidence was that she was laid off because she gave the respondent problems; and that the respondent had no problems with any of the 3 terminal operators who were retained. Specifically, he testified that Gurha neglected to do jobs she didn't like, such as distributing computer reports to other departments; that he had received reports from other departments that she could not keep up with her work; that she was anti-social to people in other departments as well as her own; that when she had a problem, she would leave her post for long periods and go above him to Burden, something she was not supposed to do; that she sometimes, in his opinion, came to work angry or disturbed; that

she often came to him with stomach problems in the middle of the day asking to go home; and that in the last two months before her lay-off, she showed no initiative and was not dependable.

43. Under cross-examination, Piccolo acknowledged, however, that apart from telling her that if she had a problem, she should follow the lines of authority and go to him first and not Burden, he had never spoken to Gurha about these complaints. Under cross-examination, Piccolo also acknowledged that the complaints from the other departments had been received when Gurha was a lead hand and that after her reclassification her only authority was to maintain her own terminal.

44. Mrs. Gurha testified that she received complaints from Burden about her performance at the time of her reclassification. She stated, however, that Piccolo never talked to her about any complaints prior to her lay-off. Gurha acknowledged asking Piccolo to leave early on three or four occasions because of a problem with her stomach. She stated, however, that Piccolo told her it was okay and not to worry. Gurha also testified that she and one of the other terminal operators had a misunderstanding once and that she had gone to Burden when Piccolo could not be found.

V

45. The fundamental right of an employee to organize and join a trade union of his own choice is protected from employer interference by a network of statutory prohibitions designed to protect both the union and the employee. The following prohibitions are relevant to these complaints:

- 56. "No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."
- 58. "No employer, employers' organization or person acting on behalf of an employer or an employers' organization,
 - (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
 - (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act."

61. "No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act."

46. Dealing first with complaint number one – when the evidence is carefully considered, the Board can come to no conclusion other than that the respondent's conduct was motivated by a desire to interfere with the rights which sections 56, 58, and 61 were designed to protect.

47. This evidence may be summarized as follows:

- i) Prior to November, 1976, the distressed or ABC merchandise of the respondent was re-sorted in the service department which was then located in the respondent's main warehouse on Northwest Drive.
- ii) On November 1st, about three weeks after the commencement of the complainant's organizing campaign, the respondent established a new department for ABC re-sorting in a satellite warehouse and staffed it with the chief organizers and certain other supporters of the complainant (the "grievors") along with 5 other bargaining unit employees.
- iii) With one exception, none of the grievors had any prior experience handling ABC merchandise.
- iv) At the time of their transfers to Drew Road, the grievors were told by various of the respondent's department managers and foremen that their transfers would be temporary.
- v) Although the respondent had used satellite warehouses on at least 22 separate occasions in the past, it had never established a new department in a satellite warehouse prior to the establishment of the "ABC re-sort" department at Drew Road.
- vi) At the time of the establishment of this new department, the lease on the warehouse which was to contain it had, option aside, only three months to run.
- vii) On December 21st, the employees who had not previously been transferred back to their old departments in the Northwest Drive warehouse, namely the grievors, were laid off; and they were not recalled until two days before the Board's initial hearing into this complaint.
- viii) By contrast with the grievors, the other employees of the respon-

dent laid off in December of 1976 had all been recalled by February 17th and 18th, the days of the representation vote between the complainant and the Labourers. Many of these recalled employees had less seniority than the grievors.

- ix) Although the respondent gave evidence that no ABC merchandise was processed for the period in which the grievors were laid off, the respondent's records, which are obviously to be preferred, indicate that ABC merchandise was processed for the period in question by employees in the respondent's service department at Northwest Drive.
- x) The respondent's records also indicate that on February 16th, and on February 17th and 18th, the days of the representation vote, ABC merchandise was processed at the Drew Road warehouse by persons other than the grievors.
- xi) On February 19th, the day following the vote, 4 of the grievors, including one of the chief organizers (Palmer), were recalled to Drew Road to allow the premises to be vacated pursuant to the terms of the lease which was to expire at the end of February.
- xii) In January and February of 1977, at a time when, by the respondent's own admission, there was no prospect of the grievors being recalled to the Drew Road warehouse, the respondent hired 15 or 20 new employees off the street to work in the shipping department at Northwest Drive.
- xiii) At the same time that these new employees were being hired, the respondent was refusing to give any consideration to transferring the grievors to that department and was taking the position that their transfers to Drew Road were permanent.
- xiv) Since their recall to Drew Road on April 22nd, the grievors have been splitting their time between the ABC re-sort department and the service department which was moved to Drew Road at about the time of the grievors' recall.
- xv) Thus, now as before, the ABC re-sort function is being done in conjunction with the service department. The respondent, however, is maintaining its departmental structure and is not allowing the employees in Service to do ABC re-sort work.

48. These facts taken together appear very suspicious on their face. Three weeks after the commencement of the complainant's organizing campaign, the respondent established a new department in a satellite warehouse, which as it turned out, was peculiarly susceptible to department wide lay-offs. Into that department were transferred the 4 chief organizers and 11 other supporters of the complainant together with 5 other bargaining unit employees – these out of a total work force of over 400 employees. When the lay-offs came, only the

key organizers and supporters remained in the new department, and there they have remained to the continued and obvious peril of their job security. In the absence of a credible and convincing explanation by the respondent of how this situation happened to occur, the Board must presume that it was intended.

49. The Board is prepared to accept the evidence of the respondent that the mass layoffs which took place in December of 1976 were the result of the respondent's poor sales performance. The Board is prepared also to accept the respondent's evidence that there was a need for additional warehouse space in November of 1976 and that this was the reason for its decision to lease a portion of the warehouse at 2280 Drew Road. The Board has not, however, been persuaded of the business justification for the establishment of a new department at Drew Road, in view of the timing of that initiative – just three weeks after the commencement of the complainant's organizing drive – and in the face of the respondent's own evidence that a new department had never before been established at a satellite warehouse and that the original lease on the premises was for only three months. Indeed, the respondent offered no explanation for its decision to establish a separate "ABC re-sort" department at Drew Road other than to state that it was permitted under the collective agreement. Counsel for the respondent agreed that a party accused of an unfair labour practice cannot hide behind a collective agreement to justify a decision that is taken for an anti-union purpose.

50. The Board is reinforced in its conclusion on this issue by the fact that the new ABC re-sort department is now operating in conjunction with the service department, the very department from which it was severed in November of 1976, allegedly for reasons of space.

51. Even assuming what the Board has found not to be the case – that an ABC re-sort department at Drew Road was established for reasons unrelated to the organizational efforts of the complainant, the Board cannot accept the respondent's explanation of how the 4 chief organizers and 11 other supporters of the complainant happened to end up as the only employees in that department. This "coincidence" is even more incredible when regard is had to the fact that of the 6 employees permanently transferred to Drew Road on November 1st, 3 (Gurha, Palmer and Persaud) were the leaders of the union initiative to bring the complainant in to replace the Labourers and to the fact that of the other 3, one (Ashley) had been involved with Gurha, Palmer, and Persaud in an earlier attempt to organize for the Upholsterers union and another (Kassie) was a forklift operator – the one skilled job required at Drew Road. It will be remembered that the November 1st transfers took place just as the complainant's organizing drive reached the stage of card solicitation and that the other chief organizer (Kelvin Williams) did not become involved until that stage of the campaign.

52. Not only has the respondent failed to provide a credible and convincing explanation for its conduct in this matter, the explanation it has offered was provided by individuals who, if their evidence is to be given any credence at all, had no involvement in the actual selection of the grievors for transfer to Drew Road other than to give and relay the message that certain functions were required and that those working under them should provide the manpower they could spare. None of the department managers and foremen alleged to have selected the grievors for transfer to Drew Road were called to give evidence before the Board. As a result, the Board has before it no evidence of why the grievors were considered

dent laid off in December of 1976 had all been recalled by February 17th and 18th, the days of the representation vote between the complainant and the Labourers. Many of these recalled employees had less seniority than the grievors.

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- xii) On February 19th, the day following the vote, 4 of the grievors, including one of the chief organizers (Palmer), were recalled to Drew Road to allow the premises to be vacated pursuant to the terms of the lease which was to expire at the end of February.
- xiii) In January and February of 1977, at a time when, by the respondent's own admission, there was no prospect of the grievors being recalled to the Drew Road warehouse, the respondent hired 15 or 20 new employees off the street to work in the shipping department at Northwest Drive.
- xiv) At the same time that these new employees were being hired, the respondent was refusing to give any consideration to transferring the grievors to that department and was taking the position that their transfers to Drew Road were permanent.
- xv) Since their recall to Drew Road on April 22nd, the grievors have been splitting their time between the ABC re-sort department and the service department which was moved to Drew Road at about the time of the grievors' recall.
- xvi) Thus, now as before, the ABC re-sort function is being done in conjunction with the service department. The respondent, however, is maintaining its departmental structure and is not allowing the employees in Service to do ABC re-sort work.

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key organizers and supporters remained in the new department, and there they have remained to the continued and obvious peril of their job security. In the absence of a credible and convincing explanation by the respondent of how this situation happened to occur, the Board must presume that it was intended.

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52. Not only has the respondent failed to provide a credible and convincing explanation for its conduct in this matter, the explanation it has offered was provided by individuals who, if their evidence is to be given any credence at all, had no involvement in the actual selection of the grievors for transfer to Drew Road other than to give and relay the message that certain functions were required and that those working under them should provide the manpower they could spare. None of the department managers and foremen alleged to have selected the grievors for transfer to Drew Road were called to give evidence before the Board. As a result, the Board has before it no evidence of why the grievors were considered

expendable and no evidence of why they were told that their transfers would be temporary. As a result also of the failure of any of the foremen and department managers to testify, the Board has before it no evidence of why the 5 bargaining unit employees transferred along with the grievors on November 1st had all been transferred back to the Drew Road warehouse by the time of the December lay-offs.

54. The main defence advanced by counsel for the respondent in this matter was that Weaver and Gauthier knew nothing of the complainant and nothing of the involvement of the chief organizers at the time of the conduct complained of. The Board does not find this position at all credible. The evidence of Gurha and Palmer is that they were actively involved in drumming up support for the complainant at the time of their transfers to Drew Road and that at this time, the complainant was the subject of discussion throughout the Northwest Drive warehouse. The Board, having regard to this evidence, to the evidence summarized in paragraphs 47 and 51, to the failure of the department managers and foremen to testify, and on the basis of our assessment of the credibility of the witnesses, finds that Weaver and Gauthier knew of the complainant's organizing drive and of the involvement of Gurha, Palmer and Persaud before the decision was made to establish a new department at Drew Road.

55. The Board finds that the establishment of the ABC re-sort department at Drew Road and the selection of the grievors for transfer into that department were in reprisal for the grievors' involvement with, and support of, the complainant and were designed to isolate and make an example of the grievors in order to stem the momentum of the campaign and thereby prevent a displacement by the complainant of the Labourers as the bargaining agent for its employees.

56. This conduct is in violation of section 56 of The Labour Relations Act which prohibits employer interference with the selection of a trade union or the representation of employees by a trade union, section 58(a) which prohibits employer discrimination in regard to employment on the basis of union membership or involvement and sections 58(c) and 61, both of which prohibit employer intimidation or coercion designed to compel an employee to refrain from becoming or to cease to be a member of a trade union or to refrain from exercising any rights under The Labour Relations Act.

VII

57. Turning now to the lay-off of Mrs. Gurha – while it may be that Gurha's performance as a terminal operator was less than exemplary, the Board, having regard to the fact that she was the most senior and also the highest paid of the employees in her classification, to the fact that she had been involved in the training of the 3 terminal operators who were retained in her stead, and to the fact that the decision to lay her off was allegedly based on conduct which occurred before her reclassification to terminal operator, has not been persuaded that her lay-off was not, at least in part, the result of the union activity of her husband. It will be remembered that Joe Gurha was the first person to contact the complainant in October of 1976.

58. In arriving at this determination, the Board has also been influenced by its assessment of the credibility of the 2 witnesses called to explain Mrs. Gurha's lay-off. Piccolo, in particular, gave the Board the impression that he was attempting to justify Gurha's lay-off *ex post facto*.

59. The Board does not accept the evidence of Burden that he was unaware in January of 1977 that Joe Gurha was involved in the complainant's organizing campaign.

60. The Board finds that the lay-off of Irene Gurha was intended to convey a clear anti-union message to both Mr. Gurha and the other employees of the respondent. The message was that the respondent was prepared to discriminate not only against the union organizers and supporters but also against members of their families in its employ. This conduct is in violation of sections 56, 58c and 61 of The Labour Relations Act."

VIII

61. That brings us to the question of remedy.

62. As regards complaint number one, the effect of the respondent's unfair labour practices has been, among other things, to permanently imperil the job security of the grievors. This has been done by transferring the grievors into a department where their seniority does not protect in the event of lay-off to the extent it would had they not been transferred.

63. Although we would agree with counsel for the respondent that it is not the function of this Board to tell an employer how to operate its business, the Board is fully empowered to make whatever remedial orders are necessary to rectify the respondent employer's contraventions of The Labour Relations Act. In this regard, the Board notes that its remedial authority under section 79(4) of the Act is expressly stated to operate "notwithstanding the provisions of any collective agreement".

64. The Board orders the transfers of the grievors to the ABC re-sort department at Drew Road revoked and directs the respondent to reinstate the grievors in the departments from which they were transferred in November of 1976, effective as of the dates of their respective transfers and without loss of seniority in those departments.

65. The grievors are to be compensated for their lost wages occasioned by their transfers which the Board has found in violation of The Labour Relations Act. In this connection, the Board recognizes that some lay-offs were economically justified in December of 1976. Accordingly, the amount of compensation owing to the grievors is to be determined by reference to the relevant seniority lists as they should have been applied in December of 1976.

66. It is unnecessary, for the purposes of this decision, for the Board to direct the respondent to return the ABC re-sort function to the service department. However, if the respondent continues the ABC re-sort as a separate department, it must do so for reasons unrelated to the presence of the complainant.

67. As regards complaint number two, counsel for the respondent advanced the rather startling proposition that the remedial provisions of The Labour Relations Act do not extend so far as to allow the Board to provide a remedy for an employee who has been discriminated against in regard to employment when that discrimination is based not on her trade union membership or involvement, but on the membership or involvement of her spouse.

68. The Board cannot accept this proposition. Assuming, but without finding, that Mrs. Gurha is not entitled to a remedy in her own right, both her husband and the complainant, who were the real targets of the respondent's unfair practices, are entitled to a remedy. The appropriate remedy is one that requires the respondent to retract the threat to both Mr. Gurha and the other employees so that they realize that such discrimination is not the price to be paid for participation in a union organizing campaign. The most effective way to have the respondent retract that threat is to require it to reinstate Mrs. Gurha. (For a similar holding in respect of the Board's remedial authority in the context of managerial personnel, see the Board's decision in *A.A.S. Telecommunications Ltd. and Zipcall Ltd.*, [1976] OLRB Rep. Dec. 751.)

69. The Board directs that Mrs. Gurha be reinstated in her position as a terminal operator with full compensation for lost wages.

70. The Board will remain seized of these matters in the event the parties are unable to agree upon the amount of compensation owing to the affected employees.

0323-77-U Reinaldo Santos, (Complainant), v. Ed's Warehouse, (Respondent).

Section 79 – Discharge for Union Activity – Whether discharge motivated by anti-union animus – Effect of employee participation in non-union activities designed to improve working conditions

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: Michael Slan for the applicant; Malcolm Robb, Q.C. for the respondent.

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL: September 2, 1977

1. This is an application under section 79 of The Labour Relations Act alleging the discharge from employment of the complainant contrary to section 58 of the Act.

2. In accordance with established Board policy and based on section 79(4a) of the Act, the respondent was called upon to go first. The respondent called one witness only, a Mr. Yale Simpson, who is the senior management official responsible for the operation of Ed's Warehouse restaurant and also for the operation of Old Ed's restaurant and Ed's Lobster house restaurant. Each of these facilities operates as a sole proprietorship and separately from the standpoint of earnings.

3. Simpson interviewed the complainant in a pre-hiring interview and states that he "did not enquire as to his trade union membership, nor was I interested ...". Santos commenced work on March 15, 1977 and continued in employment until May 16, 1977, at which time he was terminated. The termination took place after the formation of the Independent Association of Ontario Waiters which received media publicity over the period of

Santos' employment. The respondent contends the reason for Santos' termination was solely due to shortage of work produced by declining business coupled with the return to work of a long-service employee who had been absent on an extended medical leave. The respondent further contends that it had no knowledge, at the time of the termination, of the formation of the Association nor of Santos' participation therein.

4. Evidence was submitted that the volume of business in 1977 was substantially down from the volume of business in the comparable months of 1976 as follows:

January 1977 –	31.8% less meals served
February 1977 –	18.9% less meals served
March 1977 –	11.8% less meals served
April 1977 –	20.3% less meals served
May 1977 –	22.1% less meals served

The number of meals served in April and May 1977 was beginning to reflect the normal summer uptrend but, nonetheless, was still substantially below the preceding year. Evidence was also established that 23 waiters served 33,519 meals in May 1977, and 24 waiters served 42,998 meals in May 1976.

5. Simpson testified that he had a number of discussions with Aldo Cano, the *maître d'*, about the trend of volume and the staff. Simpson states that he makes the decision as to whether there should be more or less waiters. In his words, "we like to keep a reasonable amount of waiters for a certain volume of business so service won't suffer. If we take no action and business is low, each waiter suffers".

6. Evidence also established that William Fung, a waiter of 3-½ years service, had been off work for medical reasons arising out of an automobile accident for a lengthy period and was returned to work on April 4, 1977 in accordance with a prior commitment and a medical certificate dated March 30, 1977 certifying his fitness.

7. Simpson testified that when the decision was made to terminate Santos, he did not know that Santos was a member of a union but "he was dismissed because I felt we were over-staffed and would have to cut back. He was the last waiter in and would have to be the first to go". Actual notice was given to Santos by the *maître d'*, and Simpson testified that Santos spoke to him (Simpson) later in the day and alleged that the real reason for termination was because Santos was a "union man or organizer". Simpson states there was no truth to that assertion.

8. In cross-examination of Simpson, it was established that the Unemployment Insurance Record of Employment form defines Santos' termination not as a "layoff" but as "other", which Simpson states is their normal manner where dealing with a probationary employee. He further states, "If working beyond the three months and would be needed again, I would consider it a layoff". It was further established that no waiter has been hired, since Santos' termination, either for Ed's Warehouse or for the Lobster house.

9. In cross-examination, Simpson further testified that in respect to the Independent Association of Ontario Waiters, he had never heard of it prior to Santos' termination and had never discussed it with a *maître d'*. He stated that he had heard of it in the past week.

10. It is our opinion that the respondent established a *prima facie* case that the sole reason for the complainant's termination was due to a shortage of work and the consequent adjustment of the work force to the volume of business. It is clear that if the respondent's evidence should stand, the complainant must fall.

11. The complainant, in direct evidence, failed to rebut the factual case made out by the respondent and also adduced evidence that the activities engaged in were other than those of a trade union under the Act. It was the complainant's evidence that he and four or five others had, some two or three months before his employment by Ed's Warehouse, decided to form an Association. This group went to the office of a solicitor and, in Santos' words, "asked him to represent our Association and to prepare our brief for presentation to the Minister" and to include representations relative to gratuities, status as professionals or skilled labour, higher minimum wage, working conditions, etc. The evidence was that the Association has no regular dues requirement but gets donations as required.

12. Section 3 of the Act clearly states that "every person is free to join a trade union of his own choice and to participate in its lawful activities". Section 1(1)(n) of the Act defines "trade union" as "an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union and a certified council of trade unions". The preamble to The Labour Relations Act reads:

"Whereas it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions ...".

It is clear that, reading the Act as a whole, a "trade union" within the meaning of the Act is an organization of employees "formed for purposes that include regulation of relations between employees and employers" through the practice and procedure of collective bargaining. It is also clear from the evidence that, at this time, the Independent Association of Ontario Waiters does not have an objective of affecting employer-employee relations "through the practice and procedure of collective bargaining" but, rather, through representations to government. We note that many Associations have as their primary objectives precisely the same goal of, through representations, persuading government to make changes in legislation and regulations such as will advance the cause of their members. However, this is not the type of activity which, when pursued in the field of employer-employee relations by an organization not having as its primary objective the practice of collective bargaining, is considered to be a protected activity under The Labour Relations Act.

13. The Board has found that on the evidence relating to the termination of employment, it must be concluded that the termination was based solely on normal business considerations and was not, in any way, motivated by the complainant's involvement in the Independent Association of Ontario Waiters.

14. The complainant, in his evidence, failed to discharge the tactical burden of meeting and dislodging the *prima facie* case made out by the respondent that the discharge was solely for normal business reasons. We were urged by the complainant to draw an inference from evidence of media reports on the Association's activities and from evidence that one *maître d'* had knowledge of the Association, that Simpson must have known of both the activities of the Association and Santos' participation therein. In the face of direct sworn testimony to the contrary, we cannot draw such an inference. The complainant established by his own evidence that the activities in which he was engaged, and which he unsuccessfully alleges were part of the motivation for his termination, were not in fact trade union activities as defined by the Act, and it is not necessary for us to make any finding as to the effect of this.

15. The complaint is therefore dismissed.

DECISION OF BOARD MEMBER OLIVER HODGES

1. I dissent.

2. This is an application under section 79 of the Labour Relations Act wherein the applicant alleges that he was dealt with contrary to section 58 of the Act. Section 58 provides as follows:

“58. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

(b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.
R.S.O. 1970, c. 232, s. 58”

It will be observed that the section is very broad, and prohibits all coercive and discriminatory employer conduct which is designed to inhibit the exercise of an employee's rights under the Act – in particular, forming or joining a trade union. By virtue of section 79(4a) of the Act, the onus is on the employer to demonstrate that he did not act contrary to the Act. It is the employer who bears the burden of proof.

3. In this case, the respondent employer submits that the discharge was not motivated by any anti-union animus, because he was unaware of any activity on the part of the applicant which might be considered union activity, and had no knowledge of the applicant's attempts to form an independent association of waiters to represent their common interests. The employer states that the termination occurred because of a downturn in business which necessitated the termination of excess staff. In other words, there was not enough work to justify retaining Santos' services. If this is the case, why does the statement given by the employer to the Unemployment Insurance Commission suggest otherwise?

4. UIC "Record of Employment", form UIC-CAC 11-03(9-76) was issued to Reinaldo Santos 17 May 1977. The first day worked is recorded as 15 March 1977. The last day worked is recorded as 16 May 1977. The employee's occupation is recorded as "Waiter". Among the several possibilities indicated on this form for separation from employment are:

lay-off shortage of work

other

"Other" was indicated as the reason for the separation of Santos. The UIC form calls for an explanation when "other" is the reason given. No explanation appears on the form. The signature of the person certifying to the truth of the statements on the UIC form appears to be that of a Mr. F. SOOKRADGE, in the payroll department. This gentlemen did not appear to give evidence or explain the apparent discrepancy.

5. Business conditions are said by the respondent to have necessitated the discharge of Santos. While there were fewer meals served from January through May in 1977 when compared month by month in 1976, it can be seen that from February through May in 1977, each month shows an *increase* over the previous month in the number of meals served. Business in 1977 was on the upswing. Exhibit 5 entered by the respondent discloses this trend:

<i>Eds Warehouse</i>	<i>Meals Served</i>		<i>Roast Beef Rooms</i>
<i>Month</i>	<i>1976</i>	<i>1977</i>	<i>Percentage Change</i>
January	32,361	22,392	-30.8
February	31,159	25,258	-18.9
March	34,106	30,425	-10.8
April	38,554	30,735	-20.3
May	42,998	33,519	-22.0

Ex. 4 entered by the respondent indicates the number of waiters employed in corresponding months:

<i>Eds Warehouse</i>	<i>Waiters Employed</i>	
<i>Month</i>	<i>1976</i>	<i>1977</i>
January	25	23

February	25	24
March	24	24
April	26	26
May	24	23

6. When these figures were combined, the following is the result:

1976			
Month	Meals	Waiters	Meals per Waiter
January	32,661	25	1,290
February	31,159	25	1,246
March	34,106	24	1,421
April	38,554	26	1,483
May	42,998	24	1,792

1977			
Month	Meals	Waiters	Meals per Waiter
January	22,392	23	974
February	25,258	24	1,052
March	30,425	24	1,267
April	30,735	26	1,182
May	33,519	23	1,457

7. It is evident that the relationship between meals served and waiters employed is not maintained with mathematical precision. The "workload" (meals per waiter) fluctuates substantially but whatever may be said of this, it is crystal clear that in the month of May the employer served more meals than it had at any other time during the year and that the workload on the waiters was the highest. Business, although generally worse than in 1976 was clearly on the upswing. Business in May was up 9% from the previous month and up 50% from the low point in January 1977. In this period of burgeoning demand, Santos was fired – allegedly because of a lack of work.

8. In January 1976, 32,361 meals were served by 25 waiters, and that was apparently acceptable, since in February 1976 there were still 25 waiters, although meals served in February 1976 had dropped to 31,159. In May 1977, 33,519 meals were served, 1,158 more than in January of 1976, but with 2 less waiters.

9. There is no clear relationship between the number of waiters employed and meals served; nor is there a patterned response to fluctuations in demand. It is possible that the employer – a successful business – is not motivated by economic considerations, and that its conduct while apparently unjustified by the economic trends was nevertheless innocent. It is possible that the employer suffers from bad management. This could explain why Santos was hired at the beginning of a business upswing, but fired before that upswing had reached its peak allegedly for lack of work. But is this explanation probable?

10. The respondent's witness Simpson testified in chief that in March 1977 he and the *maître d'* reviewed the staff and the income of the business. The practice was to employ a

reasonable number of waiters to accord with the business. The staff was discussed with the *maître d'* every two weeks or once a month. Simpson testified that he decided if there should be more or fewer waiters. Simpson testified that he had considered the business overstaffed and that he and *maître d'* Aldo Cain decided to cut back somewhat. But William Fung was added to the staff on April 4, 1977 following his recovery from a car accident.

11. Simpson testified in chief that "We were keeping track of his health. He had been given promise of employment when well. He was a good worker with 3½ years employment at the time of the accident. I believe he was a single man. He got along well with the other waiters. They sent him flowers and told me how he was getting on. I always intended to employ him". One cannot quarrel with this laudable concern for the job security of senior employees, but why, when Fung returned on 4 April, was Santos not given notice and laid-off? Why is Santos kept on for six more weeks until Monday 16 May, and then terminated without notice? No satisfactory answers to these questions were provided.

12. Apparently Santos was not the only person hired, nor as was suggested at one point by Simpson was he "the last waiter in" and thus the first to go. Simpson was asked in cross-examination whether he had hired others when he hired Santos. He testified that he had hired a bartender shortly after he hired Santos. Santos testified in chief that a waiter other than William Fung had been hired while he was still employed, but that the new man was working on the bar. Asked whether he could tend bar, Santos said he was an experienced bartender, but that Simpson had not questioned him concerning his competence as a bartender. Simpson did, however, acknowledge that as a waiter, Santos "had a lot of experience". Santos' was never asked to take over bartending duties. He was fired.

13. Exhibit 7 entered by the respondent identified the employees and indicates their date of hiring. 47 are classified as waiters. 4 are classified as MAITRE D'. This Exhibit was prepared a week before the hearing. The respondent's witness Simpson testified that he interviewed Santos prior to hiring him. No inquiry was made into Santos' trade union loyalties or whether he belonged to a trade union. Simpson testified that he hires for all three restaurants:

Eds Warehouse

Old Eds

Eds Lobster

Cross-examined, Simpson testified that he had not hired a waiter within the year preceding Santos' dismissal, and had not hired a waiter since Santos left. However, Exhibit 7 shows 3 waiters were hired within the year preceding Santos' dismissal:

# 151 Tom Anastasios Katsikis	17 July 1976
# 168 Antoninio Castellano	27 July 1976
# 179 Louie Lai	2 September 1976

13. The testimony in chief of Santos placed his age at 42 years. He began as a waiter

25 years ago and had been in Canada for 15 years. He characterized himself as a professional waiter. In Portugal, there was one union for all waiters. He was professionally trained, beginning as a bus boy, within the union. He was required to take union examinations on his knowledge of serving customers. He was issued his union card as a first class waiter. He produced a replacement of his original card, which had been lost. The replacement card was dated 5 July 1960. In Portugal, the union card had always to be shown as a condition precedent to hiring.

Santos testified that "5 months ago I began an organization to protect us. Unions for waiters did nothing in our favour. Myself and five more people made good progress so far and have 600 members." In response to a question by counsel, he said donations rather than fees were collected. Santos explained that he went to a solicitor's office 5 months ago, before he started at Eds Warehouse. He retained a solicitor to represent the Association and to prepare a brief to the Minister of Labour. Santos testified that the objectives of the Association were:

- to avoid tips by implementing a 15% charge on meals;
- to be considered as a professional and to be recognized as skilled labour;
- to raise wages above the \$2.50 per hour minimum wage;
- to improve conditions of work and treatment by the employer.

It is evident that the Association sought by collective action to alter, *inter alia* the legislation affecting these employees and their general terms and conditions of employment.

14. The activities of this fledgling association were widely reported by the public press. Press clippings from Toronto Daily Star were entered by the complainant:

Exhibit 11 – Wednesday 23 March 1977. Mr. Jeff Lyons, counsel for the complainant, appearing as spokesman for the Independent Association of Ontario Waiters, announced his retainer by the group to prepare a brief to the government calling for changes in conditions of employment for restaurant waiters, to be made by the Ontario government, including:

- a 15% service charge in place of tipping;
- a \$2.65 minimum wage in place of \$2.55;
- a space to change;
- a place to eat;
- waiters to be relieved from menial chores such as cleaning washrooms.

(The press report announced an organizational meeting to be held Saturday 26 March 1977 to discuss the brief and promote membership.)

Exhibit 9 – A press report identifying Reinaldo Santos as the organizer of the new Independent Association of Ontario Waiters and Waitresses. The story notes Santos is the only waiter who would allow his name to be printed. The story refers to the first meeting leading to the formation of the Association when 400 signed up, as having been held in March. The objectives of the Association were stated in this press report as:

- elimination of tipping and imposition of a 15% service charge on all restaurant patrons;
- higher hourly wages and higher benefits such as unemployment insurance;
- a standard benefit program to be adopted by the Canadian Restaurant Association;
- improved working conditions and a code of employer conduct.

Exhibit 10 – “A Rebuttal Served to Restaurant *Union*” is the heading on this press clipping, marked with the date 12 May 1977. Ray Huddart, Executive Director of the 1,100 member Ontario Restaurant Association of restaurant owners, therein makes very clear the opposition of management to the objectives of the Santos organization. Reinaldo Santos is named in this press report as the one who is attempting to organize the Independent Association of Ontario Waiters and Waitresses.

15. Knowledge by the employer of an employee's union activity or intended union activity is an important element in a section 79 complaint even where, as here, the onus is on the employer to rebut allegations of misconduct. The complainant's activities were widely reported in the public press. There is no doubt as to the general employer attitude to such conduct. Whether the organization had as yet fulfilled the formal requirements to be a trade union, it was so described in the press and could reasonably have been so considered by employer. The employer and its agents have denied all knowledge of Santos' activity.

16. Newspaper reports are hearsay but the clippings entered in this case were not challenged on the ground of hearsay. Indeed, the respondent relied on these newspaper reports when cross-examining the complainant. In any event, the truth of the reports is irrelevant. What is relevant is that the employer was likely aware of and may have been influenced by them.

17. The Ontario Restaurant Association was at pains to name and rebut Santos and his organization through the daily press. The story appeared under a headline “Rebuttal Served to Restaurant Union” *four days before Santos was fired*. ORA Executive Director Roy Huddard made clear the preference of the restaurant owners and *maître d's* for tipping, and their opposition to a 15% mandatory tip, as recommended by Santos. The newspaper story also stated that there would be an organizational meeting of the Association of Ontario Waiters and Waitresses on 28 May. The Santos organization was publicly identified as

a "restaurant union" on 12 May 1977. The respondent adduced no evidence intended to show that the Santos organization was not a trade union, and made no argument to that end. In my view, the objectives of the Association of Ontario Waiters and Waitresses are trade union objectives – some to be achieved by government action and some to be achieved necessarily by collective bargaining. The organization was in its very early stages, and it is my opinion that is the reason Santos, the key figure in the organization was fired.

18. The majority decision in paragraphs 11 and 12 indicate that in their view the complainant failed to adduce evidence of trade union activity. It is the *respondent's* view of events and the *respondent's* state of mind that must be weighed, in order to decide whether the motive for discharge was tainted by an anti-union animus. If an employer discharges an employee because of a mistaken belief that the employee has been, or is about to engage in trade union activity that discharge must be illegal. Section 58(b) of the Act is aimed at employer conduct which seeks to prevent an employee from exercising rights under the Act, and in my view, section 58 (a) and (c) do likewise. It would be absurd if an employee's discharge was lawful simply because he was *not*, in fact, engaged in the conduct which provoked the discharge. If the majority are suggesting an alternative view, I simply cannot accept it.

19. The circumstances of the termination of the complainant, Santos, according to his testimony, are that when he went to start work at 5:00 p.m., (17th May, 1977), his card was gone from the rack. The card rack is located adjacent to a small office. Simpson was in the office when Santos sought the reason for his missing card, but he left without speaking to Santos. No one in the office could tell Santos why his card was out of the rack. Santos then went to the dining room where he told the *maître d'*, Aldo Cain, that his card was not in the rack. Santos also spoke to *maître d'*, Alex Abonyi, at this time, saying "I think I am fired". Alex Abonyi replied "there is no reason for that". The two *maître d'*'s are in charge of downstairs and upstairs in the restaurant where Santos served. Aldo Cain – the person who Simpson testified assisted him in determining the staff requirements for the restaurant – said he would look around. When he returned and spoke to Santos he said "You get your pay here, go".

Santos testified that he then asked to speak to Simpson, but was refused and told that he had to make an appointment to speak to Simpson. Santos left the premises and telephoned Lyons to advise him of those events. Lyons advised Santos to phone Simpson and ask why he was discharged. However, Santos chose to return, and spoke personally to Simpson twenty minutes later. Santos asked why he was fired. Simpson showed a sad face – "not happy like before", and said "too much staff – you have to go". Santos challenged this as not the real reason and inquired why, if it were true, did Simpson say to someone yesterday, "what happen to union man from your own country?" Simpson retorted "Who told you that?" and tried to lead Santos to the door. Santos testified he put his hand on Simpson's arm with a view of continuing the discussion but Simpson "made a fist to me – he thought I wanted to fight". There was a third man present who saw Santos out the door and closed it.

20. There was no explanation of the absence of notice, the 5:00 p.m. missing card incident, the observation by *maître d'*, Alex Abonyi, that "'there is no reason for that", the subsequent confirmation of dismissal by *maître d'* Aldo Cain or the confrontation with Simpson immediately following.

21. The testimony of Santos was that his friends and associates at Eds Warehouse knew what he was doing with regard to organization, that they were very interested and while some gave a contribution, they were afraid of Simpson. Asked if he spoke to the *maître d'*, Santos testified that the *maître d'*, Alex, spoke to him a month before he was fired and inquired "How is the 15% going?" Santos replied "I think the boys are working for that". This reply evoked the comment, "You are one of those working for that". According to Santos, his activities (which as indicated above had received wide press coverage) were well known at his place of employment. He confirmed at least one direct conversation with *maître d'*, Albonyi, on the subject. The employer, through its witness Simpson – who has direct contact with the employees and supervisory authority over them – denied any knowledge of Santos' activities.

22. The onus of proof in cases such as this is clearly set out in *The Corporation of the City of London* [1976] OLRB Rep. Jan. 990. (Burkett) at 995.

"...[T]he respondent must put forward a credible explanation free from anti-union motive which is established on the balance of probabilities as the only reason or reasons which precipitated the impugned activity."

23. Although a downturn in business may be genuine the Board has several times questioned whether the employer had exploited a downturn in business to disguise the real reasons for an employee's termination.

O.E.C.A., [1975] OLRB Rep. 721 (Furness)

Ernie's Signs Ltd., [1976] OLRB Rep. 125 (Burkett)

F.W. Woolworth Co. Ltd., [1976] OLRB Rep. 148 (Kates)

In *Ernie's Signs Ltd.*, the Board held for the complainant as it was not convinced, in view of the other evidence that the percent downturn in business necessitated the complainant's lay-off. In cases such as the present, the Board has considered the complainant's work record to be a particularly important piece of evidence.

O.E.C.A., supra

Corporation of the City of London, supra

Barrie Examiner, [1975] OLRB Rep. 745 (Carter)

On Mr. Simpson's own admission, Mr. Santos was a good worker with good experience.

24. The principle that protected activities need not be the sole reason for discharge but that it is enough if such activities played a part is reaffirmed in *Little Bros. (Weston) Ltd.*, [1975] OLRB Rep. 83 (Adams). The protection extends to the organizational campaign stage. (See *O.E.C.A. supra*) The complainant does not have to establish a *prima facie* case that he was discharged for union activity before the employer is called on to answer for his actions (*I.C.B. Warehousing*, [1976] OLRB Rep. 621). After all the evidence has been eval-

ated, if there is any doubt, since the onus is on the employer, it is resolved in favour of the complainant (*Barrie Examiner, supra*).

25. Santos' name first appeared in a press report of an organizational meeting held in late March 1977. That press report would have appeared in early April. This presumably accounts for the opportunity of the *maître d'*, Alex, to become informed concerning the 15% surcharge in lieu of tips. Santos testified he was spoken to by *maître d'*, Alex, about the 15% a month before his dismissal.

26. In the present case, the respondent's only witness was Simpson. The complainant's testimony as to his conversation with the *maître d'*, Alex, was not rebutted even though it suggests direct knowledge of the complainant's organizing activity and is not consistent with Simpson's denials. The respondent, in the present case, did not request particulars or seek an adjournment to investigate the matter or call the *maître d'* in rebuttal. As Santos' evidence was not rebutted it has significant weight.

27. While Simpson denies knowing about the organizational activities of Santos until a week before the hearing, that is just not credible. Simpson was in close contact with the staff and both *maître d'*. Press reports of a revolutionary change in prospect concerning tipping would be widely discussed. Furthermore, the rebuttal by the Executive Director of the Ontario Restaurant Association that appeared on 12 May 1977 under the heading "A Rebuttal Served to Restaurant Union" leaves no doubt that Simpson would be acquainted with the involvement of Santos. Mr. Huddart's explicit attack on Santos appeared on a Thursday. The following Tuesday Santos was suddenly discharged. The testimony of Simpson as to the discharge procedures followed was evasive. The procedure followed was not explained in a clear straight-forward fashion. Those said to be involved in giving the notice were not called to testify, although apparently available.

28. A most significant fact is that Mr. Santos' testimony regarding his conversation with the *maître d'* was left unrebutted by the employer. While Simpson testified that no waiters were hired in the previous year, the employer's own records indicate that three persons were hired – despite the allegedly deteriorating business situation. Santos was fired after the upswing began. In view of the onus on the employer to establish that this action was absolutely untainted by anti-union motive and as doubt is resolved in favour of the grievor, Mr. Santos must succeed.

29. I find that Reinaldo Santos was discharged unlawfully, as alleged, and I direct that he be reinstated forthwith in his previous employment with full pay, including tips extrapolated from his term of employment with the respondent, together with all applicable benefits.

**1449-76-U International Chemical Workers, Local 159, (Complainant), v.
Kodak Canada Ltd., (Respondent).**

Parties – Whether trade union organizing employees and displacing incumbent union acquires status to intervene in proceedings between predecessor union and employer where effect of Board's remedial order occur after predecessor union is displaced

BEFORE: D. D. Carter, Chairman, and Board Members O. Hodges and N. B. Satterfield

APPEARANCES: L. A. MacLean for the United Steelworkers of America and group of employees; A. D. J. Purdy and J. W. Bentham for Kodak Canada Ltd.

DECISION OF THE BOARD: August 15, 1977

1. This is a determination as to whether the United Steelworkers of America (the Steelworkers) and the employees of the respondent (Kodak) were entitled by law to be parties to the proceedings that have already been held in respect of this matter.

2. The facts of this matter are largely set out in the Board's earlier decision of February 8, 1977. The relevant parts of that decision appear below:

2. ... The complainant (Local 159) and the respondent (Kodak) had entered into a collective agreement that, according to its terms, expired at midnight, November 6, 1976. The collective agreement contained provisions establishing a voluntary, revocable dues checkoff, worded in the following terms:

ARTICLE 6 – CHECK-OFF

6.01 The Company will during the term of this Agreement if and to the extent authorized by each employee in the manner hereinafter set out, but not otherwise, deduct

- (1) from the first weekly pay of wages earned payable to such employees after the date when such authorization becomes effective, the sum of Two (2) Dollars as the initiation fee for membership in the Union and/or
- (2) from each weekly pay of wages earned payable to such employee after the date when such authorization becomes effective, the sum of Two Dollars and Twenty-five Cents (\$2.25) or such greater or lesser sum as may be imposed from time to time (by vote of the membership of the Union held pursuant to its by-laws) as the amount of weekly dues to be paid by each member of the Union to maintain his membership in the Union. Provided that the Company shall rely upon the most recent certificate of the Recording Secretary of the Union in determining the sums to be deducted from time to time hereunder but no such certificate shall become effective until the seventh day after it has been delivered to the Cashier of the Company,

and remit the sums so deducted within 1 week to the Financial Secretary of the Union. Any such authority to the Company, if given prior to the term of this Agreement, shall be in writing in the form set out in Schedule "A" to any collective bargaining agreement executed on or after the 28th day of October 1958 and in force between the Company or its predecessors, Canadian Kodak Co., Limited and Canadian Kodak Sales Limited, and the Union at the time when such authority was given. Any such authority to the Company if given during the term of this Agreement shall be given in writing in the form set out in Schedule "A" hereto, shall be irrevocable except as herein provided and shall be prepared in duplicate. The original shall be delivered to the Cashier of the Company and the duplicate retained by the Union. It shall take effect on the seventh day following the date of its receipt by such Cashier, or at such earlier time as the Company and the Union may agree upon, and on taking effect shall automatically revoke all previous authorities given by the employee concerned to the Company or its predecessors, to make any deduction from his pay and remit the amount so deducted to the Financial Secretary of the International Chemical Workers' Union, Local 159.

6.02 The Company will at the time of making each such payment to the Financial Secretary of the Union, name the employees from whose pay such payment has been deducted.

6.03 Any such authority given by an employee to either of Canadian Kodak Co., Limited or Canadian Kodak Sales Limited prior to, or to the Company during the term of this Agreement shall be automatically cancelled if such employee's service with the Company is terminated for any reason except the case of a lay off for slack work for a period of less than one year.

6.04 Any such authority, whether given prior to or during the term of this Agreement, may be revoked only during the first thirty (30) days of the term of any Collective Bargaining Agreement made between the Company and the International Chemical Workers Union, Local 159, covering the bargaining unit referred to in this Agreement or during the first thirty (30) days following the signing of any such agreement whichever period shall be later. Any such revocation shall be in writing in the form set out in Schedule "B" hereto, shall be signed in duplicate by the employee concerned and both copies shall be delivered to the Cashier of the Company. Any such revocation so signed and delivered within the period above mentioned shall become effective on the seventh day following the date of its receipt by such Cashier. The duplicate of every such revocation shall be forwarded by the Company without undue delay to the Financial Secretary of the Union.

The schedules referred to in these provisions are set out below:

SCHEDULE "A"

Date

To KODAK CANADA LTD.

During the term of any Collective Bargaining Agreement made between you and the International Chemical Workers' Union, Local 159, which provides for the deduction from the pay of employees in a bargaining unit or units of which I am a member, until my service with you shall be broken or that Union advises you that my membership in the Union is withdrawn you are hereby authorized and requested to deduct

- (1) from the first weekly pay of wages earned, payable to me after the date when this authorization becomes effective, the sum of Two (2) Dollars as my initiation fee for membership in the Union

and/or

- (2) from each weekly pay of wages earned, payable to me after the date when this authorization becomes effective, the sum of Two Dollars and Twenty-Five (\$2.25) or such greater or lesser sum as may be imposed from time to time (by vote of the membership of the Union held pursuant to its by-laws) as the amount of weekly dues to be paid by each member of the Union to maintain his membership in the Union. Provided that you shall rely upon the most recent certificate of the Recording Secretary of the Union in determining the sums to be deducted from time to time hereunder, but no such certificate shall become effective until the seventh day after it has been delivered to the Cashier of Kodak Canada Ltd.,

and remit the amount so deducted to the Financial Secretary of the said Union within one (1) week. This authorization shall become effective on the seventh day following the date of its receipt by the Cashier of Kodak Canada Ltd. or at such earlier time as you and the Union may agree upon. This authorization shall be irrevocable except during the first thirty (30) days of the term of any Collective Bargaining Agreement made between you and the International Chemical Workers' Union, Local 159, covering a bargaining unit of which I am a member or during the first thirty (30) days following the signing of any such agreement whichever period shall be later. On this authorization becoming effective, it shall automatically revoke all previous authorizations given by me to Kodak Canada Ltd., Canadian Kodak Co., Limited or Canadian Kodak Sales Limited to make any deduction from my pay and remit the amount so deducted to the Financial Secretary of the International Chemical Workers' Union, Local 159.

.....
Signature

.....
Clock Card Number

.....
Address

NOTE – Strike out (1) if not applicable.

SCHEDULE "B"

Date

To KODAK CANADA LTD.

I hereby revoke every authorization and request heretofore given by me to you or to your predecessors Canadian Kodak Co., Limited or Canadian Kodak Sales Limited to make any deduction from my pay and remit the amount so deducted to the Financial Secretary of the International Chemical Workers' Union, Local 159. This revocation shall become effective on the seventh day following the date of its receipt by the Cashier of Kodak Canada Ltd.

.....

Signature

.....

Clock Card Number

NOTE – This revocation is ineffective and will not be accepted by the Cashier of Kodak Canada Ltd. except during the first thirty (30) days of the currency of a collective agreement between the Company and the Union or during the first (30) days after the signing of such an agreement, whichever is later.

3. Bargaining for a renewal of this collective agreement commenced well prior to its contractual expiration, notice to bargain being served on August 13, 1976. A number of bargaining sessions, held during the period running from August 13th to October 7th, failed to bring the parties to an agreement. On October 7th, a request was made for the appointment of a conciliation officer and, on October 18th, the parties were advised by the Minister of Labour that an appointment had been made. Conciliation meetings occurred on six occasions between October 22nd and November 5th, but the stalemate remained unresolved. At the time of the hearing of this matter, however, the Minister had not yet notified the parties that she did not consider it advisable to appoint a conciliation board, a notification often referred to as the "no-board report".

4. A new factor was introduced into the situation on November 5th

when the United Steelworkers filed a certification application for the unit of employees then represented by the complainant. Following this application, on November 12th, Local 159 was placed under supervision and receivership, by the international union, supervisory control being placed in the hands of International Vice-President Stewart Netherton and International Representative William Mutimer. Kodak was informed of the imposition of the trusteeship in a telegram from Mr. Frank Martino, president of the International Chemical Workers' Union, dated November 12th, and in his letter of confirmation, written on November 15th. The letter stated:

Re:Imposition of International Supervision and Receivership over
International Chemical Workers Union, Local 159.

Gentlemen:

In a wire dated November 12, 1976, I advised you that International supervision and receivership had been imposed over the above-stated local union, upon the request and recommendation of International Vice President Stewart Netherton, and for good cause shown, effective November 12, 1976.

I further advised you that International Vice President Stewart Netherton had been appointed supervisor and receiver and that International Representative William Mutimer had been appointed deputy supervisor and receiver, and as such they will act as my deputies and agents in all matters relating to this local union.

I have instructed International Vice President Stewart Netherton and International Representative William Mutimer to take charge of all assets of the local union, including funds in bank or banks and to negotiate and/or police the terms of the bargaining agreement between your Company and Local 159, and to do all other things necessary in order for the local union to function properly.

I have further authorized the supervisor and deputy supervisor of this local union to remove and appoint replacements for officers and other representatives of the local union who fail or refuse to cooperate with them in the performance of their duties or as they otherwise deem necessary.

You may consider this your official notification that International Vice President Stewart Netherton and International Representative William Mutimer are in fact the supervisor and receiver and deputy supervisor and receiver, respectively, over Local 159, and that they are the proper persons to receive checkoff payments, to negotiate and police the contract in person or through their designated agents, and to do all other things necessary to carry out the language, spirit and intent of the bargaining agreement between your Company and our Local 159.

The authority for my action may be found in Article VI, Section 5 of the International Union Constitution, a copy of which is enclosed.

I shall immediately notify you when any or all restrictions are removed from this local union.

I will appreciate your cooperation and assistance to International Vice President Stewart Netherton and International Representative William Mutimer in carrying out their functions.

Sincerely yours,

[sgd] "Frank D. Martino"

Frank D. Martino, President

5. On November 15th, however, Kodak posted a notice advising employees that there would be no further check-off of union dues. The notice read:

To Bargaining Unit Employees, Local 159, I.C.W.U.

In accordance with the terms of Article 6.01 and Schedule "A" of the Collective Bargaining Agreement which terminated midnight November 6, 1976, there will be no further payroll deduction of union dues. This will be reflected in pay cheques distributed on or about November 18, 1976.

[sgd] "John Hill"

Director of Corporate
Relations

The dues check-off was in fact terminated as of the pay period commencing on November 7th. The termination of the dues check-off upon the contractual expiry of the collective agreement was a deviation from the practice followed in similar bargaining situations occurring during the ten-year relationship between Kodak and Local 159. Apparently, on previous occasions, the check-off had continued until being renewed by a new agreement, or until the parties had reached the strike-lockout position.

6. At about the same time as these events were occurring the Board was dealing with the application for certification from the Steelworkers. A pre-hearing vote was ordered on November 25th, and the vote itself was taken on December 7th and 8th. The report of the returning officer, received just prior to the hearing in this matter, indicated that the Steelworkers had received more votes than the incumbent, Local 159. Barring any defects in the vote, then, Local 159 faced the imminent prospect of having its bargaining rights divested by operation of section 48 of the Act.

3. The Board's first hearing of this complaint took place on December 10, 1976. On January 10, 1977, the Board issued a certificate to the Steelworkers, and the effect of this certificate was to displace the complainant, Local 159 of the International Chemical Workers, as bargaining agent for the employees of Kodak. Subsequently, on February 8, 1977, the Board issued its decision in this complaint that Kodak had violated section 70(1) of the *Labour Relations Act* by failing to deduct and remit union dues to Local 159 from November 7, 1976 to January 10, 1977, the point at which Local 159's bargaining rights ceased to exist.

4. The respondent then sought clarification of this decision. A hearing was held on April 7th and, on April 14th, the Board issued the following clarification:

The Board's direction was worded in the following terms: "[t]he respondent, therefore, is ordered to pay forthwith to the applicant all monies to which the applicant is legally entitled by the operation of section 70(1)." This direction means that there is a primary responsibility on the respondent to pay forthwith to the applicant all monies to which the applicant is legally entitled by the operation of section 70 subsection (1) of the Act. The respondent, however, is entitled to seek reimbursement from those employees who had authorized the deduction of union dues to the extent of the amounts so authorized.

Following this clarification, on April 14th, the employees who had authorized the check-off were informed that the union dues that had been the subject of the complaint before the Board would be deducted from their pay. The notice that was given to each of these employees reads as follows:

April 14, 1977

Payroll deduction of union dues was discontinued in November, 1976. This action was objected to by the International Chemical Workers' Union to the Ontario Labour Relations Board.

The Ontario Labour Relations Board made its final decision on April 7 and ordered union dues to be paid to the International Chemical Workers' Union on behalf of all employees on check-off.

Pursuant to such an order the sum of \$20.25 has been deducted from your pay representing union dues for the period November 7, 1976, to January 9, 1977.

5. The Steelworkers and the employees of Kodak assert that they did not receive notice of the earlier proceedings, and are requesting the Board to reconsider its decision of February 8, 1977, and April 14, 1977. More specifically, they are asking that the matter be set down for a fresh hearing on the merits before a differently constituted panel of the Board. The requests are premised upon the assumption that the Steelworkers and the employees had an interest in this matter that was sufficient to make them parties to the proceedings and, therefore, entitled to notice of the earlier proceedings.

6. We have considerable doubt about the validity of this assumption. First, dealing with the position of the Steelworkers, it is quite clear that they did not hold bargaining rights for the Kodak employees at any time during the period of time to which the Board's decision and subsequent clarification relate. The relief ordered by the Board runs only to the time at which Local 159 was displaced by the Steelworkers. Prior to the displacement, the Steelworkers were outsiders to the collective bargaining relationship between Kodak and Local 159, and had no interest that would entitle them to notice of the proceedings. The acquisition of bargaining rights by the Steelworkers during the course of the proceedings does not alter this conclusion. The Board's initial decision, and the clarification of this decision, were all part of the same proceedings, which had commenced at a time when the Steelworkers had no interest. The fortuitous fact that the Board's decision was not rendered and clarified until after the certification of the Steelworkers cannot serve to create an interest where none existed before. The fact is that the relief ordered by the Board does not relate to the bargaining relationship between Kodak and the Steelworkers, but only to the previous relationship between the employer and Local 159. We, therefore, find that the Steelworkers were not entitled by law to be parties to the proceedings.

7. Can it be said, though, that the employees who had authorized a check-off of union dues have a sufficient interest to make them parties to the proceedings? Counsel for the employees argued that, because pursuant to the Board's clarification the employer had deducted from their pay amounts representing union dues for the period from November 7, 1976 to January 9, 1977, the situation was similar to those found in *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al* (1968), 65 D.L.R. (2d) 641 (S.C.C.) and *Re Bradley et al and Ottawa Professional Firefighters Association et al* (1967), 63 D.L.R. (2d) 376 (Ont. C.A.). The facts in each of these cases, however, can be distinguished from the matter before us.

8. In *Hoogendoorn*, The Supreme Court of Canada found as a fatal defect the failure to notify an employee of an arbitration hearing, at which the union was seeking to enforce a union security provision against an individual employee, because the proceeding concerned only the continuation of that employee's employment. The proceedings in this matter, unlike the *Hoogendoorn* case, were not unnecessary, as between the union and the employer, since there existed a very real difference between them as to the extent of the freeze imposed by section 70(1) of the *Labour Relations Act*. What was at issue before us was the status of the collective bargaining relationship during the statutory freeze period, a matter pertaining directly to the authority of the union as exclusive bargaining agent for the employees. The interests of the employees in these proceedings was much less significant than those of either the union or the employer, being only the possibility that they might be affected indirectly when the Board exercises its remedial authority. We, therefore, consider this matter to be of a different order than the *Hoogendoorn* case, where it was clear that the overriding interest was that of the employee who was facing the possibility of dismissal.

9. The *Bradley* case, *supra*, is also distinguishable from this fact situation. The Court of Appeal in that case recognized that the collective agreement confined substantive employment benefits for which different employees are forced to compete. The existence of these "contractual advantages" created a sufficient interest in the employees covered by that agreement so as to entitle them to notice of an arbitration proceedings that might affect adversely those advantages. In this case, however, we are not allocating contractual advantages among employees through the exercise of contract interpretation. Rather, we are deal-

ing with the status of the collective bargaining relationship at a particular point in the negotiating process, and attempting to ensure that it is maintained as required by the *Labour Relations Act*. Individual employees, although they may be affected ultimately by our determination in this kind of matter, do not have the same degree of interest as where an arbitrator is allocating limited contractual advantages.

10. Our conclusion is that both the *Hoogendoorn* case and the *Bradley* case can be distinguished on the basis that in each of them there existed a much greater employee interest in the outcome of the proceedings. In this case, although the employees were indirectly affected by the Board's decision, we do not consider the interest to be sufficient to conclude that they were entitled by law to be parties to the proceedings. The fact is that all determinations made by this Board have some impact upon individual employees. It would be completely impracticable to serve notice on all these employees regardless of the degree to which they are affected by the outcome of the proceedings. The Board, as it did in this case, has made a judgment based on the facts before it as to whether the employees' interest is sufficient to entitle them to participate as parties to the proceedings.

11. Accordingly, the request for reconsideration and a fresh hearing is denied.

12. As a footnote, we consider that it might be useful to explain the reasons behind the Board's clarification of April 14th. It is clear that the employees take the view that the employer, having violated section 70(1), should bear all the financial consequences of its breach, and that the employer should be required to pay from its own pocket the union dues that it improperly failed to collect, giving the employees the windfall benefit of not having to pay the dues that would have been deducted.

13. The Board, however, does not consider that its remedial powers should be exercised in such a punitive fashion when dealing with breaches of section 70(1). The purpose of section 70(1) is to stabilize the collective bargaining relationship for a set period following the expiry of a collective agreement in order to provide a final opportunity for negotiations without resort to economic sanctions. A breach of section 70(1), therefore, is not premised upon anti-union motive, but results from any alteration of the frozen relationship. The liability on both parties is strict, and a breach may occur without the presence of an anti-union animus. The appropriate remedial approach, in our opinion, should be directed at restoring the relationship that has been disrupted, rather than at punishing the party in breach. The clarification of our earlier decision reflects such an approach. The employer, although primarily liable, has been authorized to seek reimbursement from those employees who had authorized the deduction of union dues to the extent of the amounts so authorized. In this way, the employer bears the risk of not obtaining reimbursement, but does not have to provide a windfall benefit to the employees who had authorized the deduction.

0223-77-U Local 304 – Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers, (Complainant), v. Molson's Brewery (Ontario) Limited, Toronto, (Respondent).

Section 79 – Change in Working Conditions – Whether alteration of working conditions pursuant to management rights clause in former collective agreement constitutes breach of statutory freeze during negotiations – Whether management right to alter shift schedules also frozen

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *E. G. Posen for the complainant; M. G. Mitchnick, R. Kitimura and L. Laishley for the respondent.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER H. J. F. ADE: August 8, 1977

1. This is a complaint filed under section 79 of The Labour Relations Act which alleges that the respondent has violated section 70(1) of the Act. It would perhaps be helpful at this point to set out both section 70 subsections (1) and (2) in full.

“70.-(1) Where notice has been given under section 13 or section 45 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

(a) until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
- (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board,

as the case may be; or

(b) until the right of the trade union to represent the employees has been terminated, whichever occurs first.

(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages

or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 13, in which case subsection 1 applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board, or withdrawn by the trade union.

2. The complainant and the respondent were parties to a collective agreement which expired on December 24, 1976. On November 24, 1976 the complainant served notice on the respondent of its desire to bargain with a view to the renewal of the collective agreement. While several negotiating sessions have been held, no agreement has been reached as to the terms of a new collective agreement and neither of the parties has applied for the appointment of a conciliation officer. It follows from these facts that upon the expiry of the collective agreement the "freeze" on wages and working conditions provided for by section 70(1) immediately came into effect.

3. This complaint arises out of a dispute concerning the scheduling of shifts in the respondent's shipping section. It is undisputed that for some twenty years the respondent had maintained essentially the same shift times in its shipping section, although it had changed shifts in other areas as recently as 1971. During the month of April 1977 the respondent's officials came to the conclusion that by making certain changes to the respondent's operations and by altering certain shift schedules they could effect an increase in production. These proposed changes were discussed with representatives of the complainant, but although these discussions led the respondent to alter its plans somewhat the complainant did not consent to any changes being made in the shift schedules of employees in the shipping section. Notwithstanding this lack of consent the respondent on May 2, 1977, instituted certain shift changes in the shipping section. These changes were later withdrawn pending a determination by the Board as to the propriety of the respondent's action in implementing the changes.

4. The changes in the shift scheduling implemented by the respondent did not result in a major readjustment in shift times. The effect of the changes was to advance by half an hour both the starting and finishing times of eight employees (out of 38) on the day shift and eight employees (out of 37) on the night shift. There were no changes in the scheduling of employees on the midnight shift. It is worth noting that because of the manner in which employees rotate in the shipping section the respondent estimated that each of the seventy six employees in the section would encounter a new starting time during only eight to ten weeks of each year.

5. Although not denying that changes had been made to the scheduling of shifts in the shipping section during the freeze period provided for by section 70(1), counsel for the respondent contended that having regard to Article 3 of the expired collective agreement no breach of section 70(1) had occurred. Article 3 is a "managements' rights" clause which provides, *inter alia*, that it is the exclusive function of the respondent to manage the enterprise and to "determine ... the schedules of manufacturing, processing, packaging, shipping and distribution". While Schedule "A" to the collective agreement deals with hours of work and the scheduling of work, it does not set out specific times for each shift. Indeed, even without

the new changes there were already five different starting times on both the day and afternoon shifts in the shipping section.

6. In assessing the effect, if any, of Article 3 of the collective agreement on this complaint, counsel for the complainant contended that the action of the respondent in not changing the shift schedules in the shipping section for some twenty years had effectively modified the article at least insofar as the shipping section was concerned. We are unable to agree with this contention. The terms of a collective agreement are surely to be derived from the plain written words of the agreement itself. [See: *Regina v. Barber et. al.* (1968) 2 O.R. 245 (Ont. C.A.)]. Further, there is nothing before us to indicate that the respondent led the complainant to rely to its detriment on any expressed or implied assertion on the part of the respondent that it would not be relying on the relevant portion of Article 3. This being the case, we are of the view that the equitable doctrine of estoppel does not apply here, even if we were to assume that otherwise it might be applicable. [See: *Edwards of Canada, Unit of General Signals of Canada Ltd.* (1974) 6 L.A.C. (2d) 137 (Adams)].

7. In its application of section 70(2) the Board has indicated that it regards the effect of that subsection as being to maintain the existing terms of individual contracts of employment between employers and employees. (See: *Kodak Canada Ltd.* [1977] OLRB Rep. Feb. 49 at p. 59). This appears to be consistent with the apparent purpose of the subsection which is to ensure that following the filing of an application for certification and during the period required by the Board to resolve the issues relevant to the application, no interruption will occur in the existing employment relationship which may influence employees with respect to representation by the applicant union. (See: *Beaver Electronics Limited*, [1974] OLRB Rep. March 120 at p. 122). The wording of section 70(1), however, differs somewhat from that of subsection (2). Subsection (1) not only prohibits an employer from seeking to unilaterally alter any terms or conditions of employment or any right, privilege or duty of the employer, the union or the employees, but it also goes on to prohibit the trade union from altering unilaterally "any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees". As the Board noted in the *Kodak* case, *supra*, what appears to be contemplated by section 70(1) is a total freeze of all the legal incidents of the collective bargaining relationship between the parties until such time as either a new collective agreement is negotiated or the parties become entitled to resort to economic sanctions. Such an approach, in turn, means that the operation of the various provisions of the collective agreement is extended until such time as the force of section 70(1) is spent.

8. That the legislature contemplated a continuation of the collective bargaining relationship during a section 70(1) freeze is, we feel, strongly indicated by section 70(3). This subsection stipulates that where notice to bargain has been given under section 45 and no collective agreement is in operation, any difference between the parties as to whether or not subsection (1) was complied with may be referred to arbitration "as if the collective agreement was still in operation". It is worth noting in this regard that boards of arbitration have taken the position that because of sections 70(1) and 70(3) grievances filed during a freeze period following the expiring of a collective agreement can be brought forward to arbitration for determination as if they had been filed during the life of the agreement itself. [See *Berlet Electronics Ltd.* (1968) 19 L.A.C. 152 (Weatherill), *David Barry Co. Ltd.* (1968) 19 L.A.C. 157 (O'Shea) and *Truck Crane Service Ltd.* (1973) 4 L.A.C. (2d) 250 (O'Shea)].

9. Having concluded that the effect of section 70(1) is to continue the collective bar-

gaining relationship between the parties as it existed under the now-expired collective agreement, we now turn to examine that agreement so as to determine what the terms of that relationship were in so far as the scheduling of shifts was concerned. By the collective agreement the union *expressly* acknowledged that it was the respondent's exclusive function to determine work schedules. Or, to put it another way, during the negotiations leading up to the signing of the collective agreement the complainant specifically recognized that during the term of the agreement the respondent would possess the right to determine the scheduling of work. It is our view that this express right of the respondent is an incident of the collective bargaining relationship which the respondent continues to enjoy pursuant to section 70(1), and which the complainant by that section is prohibited from now seeking to unilaterally alter.

10. Before leaving this point we would stress that in the instant case we are dealing with an express right of management under the collective agreement. Our decision may well have been different had this express right not been included in the collective agreement and the respondent had instead relied only on the principle that management retains the right to initiate any changes in the work place which are not expressly restricted by the terms of a collective agreement. It appears to us that any such general entitlement on the part of management to initiate change may well be limited by the effect of section 70(1).

11. It is clear on the facts before us that at all relevant times the respondent was acting in good faith. Indeed, counsel for the complainant expressly stated that the complainant accepted that the respondent's reasons for wanting to alter the shift schedules were entirely *bona-fide*. We would note, however, that should an employer in a like situation seek to act in a manner calculated to either discriminate against employees because they are seeking to exercise any of their rights under the Act, or so as to obtain an unfair advantage in collective bargaining, then those situations would appear to be the proper subject matter for a complaint alleging a violation of either the unfair labour practice sections of the Act or of the requirement of good faith bargaining set out in section 14.

12. Having regard to our determination in paragraph 9 above, this complaint is hereby dismissed.

DECISION OF BOARD MEMBER D. B. ARCHER:

The facts as outlined are quite correct. I believe the respondent acted contrary to the spirit of the Act in changing working conditions that had existed for twenty years, during the negotiating period. If the change had been made at some other time the matter could have been arbitrated and finally disposed of in this manner.

0225-77-U Local 304 – Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers, (Applicant), v. Molson's Brewery (Ontario) Limited, Toronto, (Respondent).

Consent to Prosecute – Whether prosecution will promote good industrial relations between the parties where alleged violation not serious and no anti-union motive is evident

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: E. G. Posen for the applicant; M. G. Mitchnick, R. Kitimura and L. Laishley for the respondent.

DECISION OF VICE-CHAIRMAN IAN C. A. SPRINGATE AND BOARD MEMBER H. J. F. ADE: August 8, 1977

1. This is an application for consent to institute a prosecution of the respondent for an alleged breach of section 70(1) of The Labour Relations Act.

2. The facts relevant to this application are set forth in the Board's decision relating to a section 79 complaint which was heard at the same time as this application. (See File No. 0223-77-U). The Board dismissed the section 79 complaint on the basis of its conclusion that the respondent had not breached section 70(1). However, even if we were to accept that the respondent had succeeded in making out at least a *prima facie* case or in raising an arguable point of law which might properly be determined by a Provincial Court Judge, we nevertheless feel that this is not the proper case for the Board to grant its consent to the institution of a prosecution.

3. Before the Board will grant its consent to the institution of a prosecution the Board must be satisfied that a prosecution would be consistent with the promotion of good industrial relations between the parties. (See: *A.A.S. Telecommunications Ltd. and Zipcall Ltd.* [1976] OLRB Rep. Dec. 751). If not so satisfied a consent to prosecute will not be forthcoming even if the applicant has succeeded in making out a *prima facie* case and in raising an arguable point of law. In the instant case the respondent, relying on what it felt were its rights under an expired collective agreement, made some relatively minor changes in its shift scheduling. There is no suggestion that in so doing the respondent was motivated either by a general anti-union animus or by a desire to gain some sort of advantage in the collective bargaining then underway between the parties. Prior to implementing its proposed changes the respondent sought, unsuccessfully as it turned out, to work out some sort of arrangement which would be satisfactory to the applicant union. Further, once the applicant challenged the scheduling changes the respondent withdrew the changes until such time as this Board could rule on the legality of the respondent's actions. Having regard to these facts, we are of the view that the respondent acted at all relevant times in complete good faith. We are also of the view that to allow the applicant to commence a prosecution against the respondent in the Provincial Courts in these circumstances would not only fail to serve any valid industrial relations purpose, but would very likely put an unnecessary strain on what appears to be basically a sound relationship between the parties. It is for this reason that we would withhold our consent.

4. This application is hereby dismissed.

DECISION OF BOARD MEMBER D. B. ARCHER:

I agree with the majority that prosecution is unlikely to be of assistance and would probably exacerbate the friendly relations between the parties that now seem to exist.

0576-77-U; 0577-77-U International Beverage Dispensers' & Bartenders Union of the Hotel and Restaurant Employees' and Bartenders' International Union, Local 280, AFL, CIO, CLC, (Applicant), v. **Oakwood Hotel (Toronto) Limited, (Respondent)**.

Section 79 – Discharge for Union Activity – Lockout – Whether employer conduct constitutes both unfair practice and a lockout – Whether lockout relief available in addition to remedy given under section 79

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: Beth Symes and Julius Troll for the applicant/complainant; William Knights for the respondent.

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN AND BOARD MEMBER J. D. BELL: August 4, 1977

1. The Board directs that the above applications be and the same are hereby consolidated.

2. This is a complaint under section 79 alleging violations of section 56, 58 (a), (b) and (c), sections 59(1) and 70(1) and (2), and an application under section 83 seeking a declaration of unlawful lockout.

3. At the hearing, the parties agreed that their agreed statement of facts applicable to a section 79 complaint (Board File 0577-77-U) should be considered as evidence in the section 83 application (Board File 0576-77-U).

4. The parties agreed upon a statement of facts to be applicable to the application under section 79 as follows:

- The union was certified as bargaining agent for all employees below the rank of Manager on February 7, 1977 at which time the unit consisted of five employees.

- The hotel was sold to its present owners on February 14, 1977.

- The union gave notice to bargain by registered mail on February 15, 1977 and received no response from the employer.

- A second notice to bargain was sent on March 8, 1977 by registered mail.
- A third notice by hand-delivered letter was served on April 1, 1977. This resulted in a reply from the employer's solicitor outlining 23 amendments to be effected in the proposed agreement.
- The employer cancelled the group life plan covering these employees and made an upward adjustment in wages on February 22, 1977. This matter was the subject of a section 79 complaint in Board File No. 2090-76-U and a decision issued on July 7, 1977 by another panel of the Board found the hotel to have been in violation of section 70(1).
- An employee, Argiropulos, was discharged on March 10, 1977, which discharge was the subject of an application under section 79 of the Act alleging a violation of section 58. This was dealt with under the same Board file as above noted and the Board found the employer to be in violation of section 58 and ordered reinstatement.
- An employee, Pavlos, was terminated with two weeks' notice on May 13, 1977. This termination likewise became the subject of a section 79 application under Board file 0328-77-U. The decision of the Board issued July 6, 1977 in this instance found that the employer, in implementing its policy of replacing existing bargaining unit employees with owners and relatives of owners, was in violation of section 70(1) and directed "the employer to cease and desist from replacing bargaining unit employees during the term of the Section 70 'freeze' and to return Mr. Pavlos to his employment forthwith". The Board also found, alternatively, that termination of Pavlos' employment was a violation of section 58.
- An application by the union alleging a violation of section 14 of the Act by the employer came on for hearing on July 5, 1977. In the course of the hearing, the employer agreed to commence meetings with the union and the Board consequently adjourned the hearing "sine die". Two meetings have since been held without progress and the company's stance of intending to replace all bargaining unit employees with relatives is unchanged.
- On July 2, 1977, Mr. Deand Viney was discharged, (which discharge is the subject of the current application under section 79). It was agreed that Viney was a good waiter and there were no complaints about his performance, and further agreed that the reasons for his discharge are exactly the same as those established in the discharge of Pavlos in Board File 0328-77-U.
- As agreed, Viney was called to testify that he had been in the employ of the employer for 16 years. Viney received two weeks severance pay, and an alternative application has been made under The Em-

ployment Standards Act relating to the amount of severance pay to which he would be entitled.

5. On the basis of the agreed statement of facts, we adopt the reasoning and conclusions of the other panel of the Board, based on similar facts and presided over by Mr. Kevin M. Burkett, in Board File 0328-77-U, and find the respondent employer to have terminated Mr. Viney in contravention of section 70(1) and alternatively of section 58(a) of the Act.

6. The Board hereby directs that Mr. Viney be returned to his employment forthwith and that he be compensated for his lost wages resulting from his termination. The Board will remain seized of this matter in the event the parties are unable to agree upon the exact amount of compensation owing to the grievor.

7. We turn now to the application made under section 83 of the Act for a declaration of unlawful lockout. The applicant urges that the individual discharges of March 10, 1977, May 13, 1977 and July 2, 1977, were all founded in the same anti-union animus and that the employer has a single-purposed program of relieving himself of a union relationship obligation through replacing union members in employment with relatives.

8. The evidence is clear that the employer was surprised and upset, on purchasing the business, to learn of the existence of the union. The testimony of Pavlos that he was called to the office in March 1977 and that the Manager, Mr. Cammarota, warned him that if he tried to bring the union in it would result in everyone being fired and the owners working, was a patent outline of the program to be followed. In the light of subsequent events, the discharges of Pavlos and of Viney for the same stated reason in each case of "due to increased involvement in owner operation" leads to the conclusion that the discharges were a refusal to continue to employ them because of union membership (as has been found in the Board decision above referred to).

9. As was said by the Board in the case of *International Association of Machinists, Local 2506 v. Ralph Milrod Metal Products Ltd.*, [1977] OLRB Rep. Feb. 79 at page 87:

"The termination or suspension of employment by an employer, be it the closing down of a plant, the contracting out of work or the lay-off or discharge of employees, only becomes a lockout under the Act. ...if it is taken for a purpose which is encompassed by the statutory definition of lockout."

and further, in paragraph 26,

"There is, however, a second kind of coercive activity on the part of an employer which will qualify as a lockout under the Labour Relations Act. As the definition makes clear, an employer engages in a lockout if it refuses to employ with the objective of compelling employees 'to refrain from exercising any rights or privileges under the Act'."

10. The finding has been made that the refusal to continue to employ the three employees was, in each case, with the objective of compelling them to refrain from exercising their rights under the Act; and, in view of all the circumstances, could well bring the actions

within the terms of the statutory definition. In our view, however, this is not a proper case for an exercise of the Board's discretion inasmuch as the remedial action which would flow from such an exercise would be duplication of remedial actions already directed by the Board. The employer has been directed to reinstate the three discharged employees as a result of the separate applications under section 79; the employer has been further directed as a result of one of the section 79 applications to cease and desist, during the term of the section 70 "freeze", from replacing bargaining unit employees. The Board therefore refuses to exercise its discretion by making a declaration of unlawful lockout, and the application is dismissed.

DECISION OF BOARD MEMBER OLIVER HODGES

1. I concur with the majority in ordering reinstatement of Deand Viney in Board File 0577-77-U.
 2. I would have granted concurrent relief as sought by the complainant under S.83, and I therefore dissent in the dismissal of the S.83 application in Board File 0576-77-U, with reasons to follow.
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0419-77-R William Scott, (Applicant), v. International Union of Doll & Toy Workers of the U.S.A. and Canada, Local 905, (Respondent)

Termination – Effect of irregularities in solicitation of employees opposed to incumbent union where Board otherwise satisfied as to voluntariness of petition

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members O. Hodges and N. B. Satterfield.

APPEARANCES: William Scott and William James Anderson for the applicant; Alan M. Minsky, Marilou McPhedran and Keith Coutlee for the respondent; J. F. McGee and Stan Leader for Standard Brands Canada Limited.

DECISION OF THE BOARD: August 12, 1977

1. The name: "Local 905 International Union of Doll, Toy, and Novelty Workers" appearing in the style of cause of this application as the name of the respondent is amended to read: "International Union of Doll & Toy Workers of the U.S.A. and Canada, Local 905".
2. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent trade union no longer represents the employees of Standard Brands Canada Limited in a bargaining unit for which it is currently the bargaining agent.
3. The respondent and Standard Brands Canada Limited (hereinafter referred to as "the employer") were parties to a collective agreement which expired on June 30, 1977. The

description of the bargaining unit covered by this collective agreement is spread out over a number of provisions of the agreement. However, the parties were in agreement that the bargaining unit could properly be described as including all employees of Standard Brands Canada Limited at its plant located at 2463 Royal Windsor Drive, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.

4. The parties were in agreement that the applicant, Mr. William Scott, is an employee in the above referred to bargaining unit. The parties also agreed that this application was timely.

5. The representative of the employer requested that the Board apply this application not only to the bargaining unit referred to above, but also to a second bargaining unit for which the respondent possesses bargaining rights. This request was based upon the fact that since 1973 negotiations for both bargaining units have been carried on simultaneously and that the terms of the resulting collective agreements have been identical. At the hearing the Board indicated it could not accede to the employer's request. Section 49(2) of the Act stipulates that any of the employees "in the bargaining unit defined in a collective agreement" may apply for a declaration that the trade union no longer represents the employees "in the bargaining unit". By implication it is the bargaining unit defined in the collective agreement which is also "the bargaining unit" referred to in subsections (3) and (4) of section 49. Having regard to these statutory provisions, it is incumbent upon the Board to concern itself only with the bargaining unit defined in the relevant collective agreement.

6. In considering an application such as this the Board, pursuant to section 49(3) of the Act, is required to ascertain "the number of employees in the bargaining unit at the time the application was made and whether not less than forty-five per cent of the employees in the bargaining unit have voluntarily signified in writing ... that they no longer wish to be represented by the trade union". In the instant case, on the date of the making of the application there were 101 employees in the bargaining unit. In support of the application were filed 90 statements of desire, 88 of which bear the signature of an employee within the bargaining unit. Each of the statements of desire is in either the English, the Italian or the Portuguese language. Although the English, Italian and Portuguese versions differ one from another, each reflects a desire to be represented by another trade union. The three versions are set out in full as follows:

English

"For many reasons, we have come to be dissatisfied [sic] with the Doll & Toy Workers Union. We therefore have decided that we wish to decertify local 905 of the Doll & Toy Workers Union and approach another union about the possibility of becoming a local within their auspices.

We therefore show our agreement by affixing our signatures below."

Italian (translation)

"In every respect we are dissatisfied with "DOL E TOLS" [sic] Workers' Unions. For this reason we want to change our union. I am sure of this and sign below."

Portuguese (translation)

"Due to various reasons we have come to the agreement to change from the Union we have to another which is called:

Canadian Food & Allied Workers in witness whereof we are signing below."

7. The prime movers behind the coming into being of the statements of desire were the applicant, Mr. Scott, and a fellow employee, Mr. William Anderson. The evidence indicates that by February of 1977 they and a number of like-minded employees had become dissatisfied with the representation being afforded them by the respondent. As a result of this dissatisfaction the decision was reached to approach another trade union about the possibility of it becoming the employees bargaining agent. Approaches were in fact made to two different unions, one of which, the Canadian Food and Allied Workers, (hereinafter referred to as "the Food and Allied Workers") indicated its willingness to represent the employees. It was largely on the recommendation of Mr. George Ellis, an official of the Food and Allied Workers, that the statements of desire were prepared and circulated.

8. The evidence of Mr. Scott and Mr. Anderson indicates that they originally intended the statements of desire to be used in a termination application such as this one. It is also clear, however, that if the application were successful it was their expectation that the Food and Allied Workers would then apply to be certified, and indeed a number of employees subsequently signed applications for membership in that union. Following the circulation of the statements of desire in February, however, Mr. Scott discovered that no application to terminate the respondent's bargaining rights could be made until May 1, 1977. At that time Mr. Scott gave the documents to Mr. Ellis. He stated that he did so "to ensure that Mr. Ellis took us seriously". At some point, it is not clear when, the possibility arose that the Food and Allied Workers might be willing to apply directly to the Board to displace the respondent as bargaining agent. Mr. Ellis, however, was apparently concerned that such an action might be regarded as an unauthorized "raid" contrary to the constitution of the Canadian Labour Congress, a body to which both unions are affiliated, and as a result of this concern the Food and Allied Workers made an application to the Canadian Labour Congress for permission to acquire the respondent's bargaining rights. The details of this application are not before the Board. In June of 1977, representatives of the Food and Allied Workers indicated to Mr. Scott and Mr. Anderson that they doubted that their application to the Canadian Labour Congress would be successful. As a result of this information, Mr. Ellis was asked to return the statements of desire and they were then forwarded to the Board along with an application under section 49. There is no doubt in our mind that it is the hope of Mr. Scott and Mr. Anderson that should this application be successful the Food and Allied Workers will apply to the Board to be certified.

9. Counsel for the respondent contended that the wording on the statements of desire was not sufficiently clear so as to be sufficient to support an application such as this. With this we cannot agree. By Section 49(3), employees must have "signified in writing ... that they no longer wish to be represented by the trade union". The statements of desire before us indicate quite clearly that those signing them no longer wish to be represented by their current bargaining agent. The fact that to varying degrees they also indicate a desire to be represented by another trade union does not, in our view, detract from this basic fact.

This being the case, we are satisfied that the wording of the statements of desire is sufficient to meet the requirements of section 49(3).

10. Counsel for the respondent also submitted that the Board should not accept the statements of desire as properly supporting the application in that, in his view, the employees who signed them did so on the understanding that they were for the use of the Canadian Labour Congress rather than for the use of this Board. This is a submission which can quickly be disposed of. There is, in fact, nothing in the evidence which even suggests that employees were told prior to the signing of the statements of desire that the documents would be filed with the Canadian Labour Congress. Indeed, the evidence indicates that the decision to approach the Canadian Labour Congress was made by the Food and Allied Workers subsequent to the signing of the statements of desire.

11. As a further submission with respect to the acceptability of the statements of desire, counsel for the respondent contended that there was a condition attached to the signing of them, namely that no "gap" occur between the time when the respondent's bargaining rights might be terminated and the acquiring of bargaining rights by another trade union. While it may be that certain of the employees reading the statements of desire – and particularly those in the Italian and Portuguese languages – could have concluded that any termination of the respondent's bargaining rights would be accompanied by an immediate acquisition of those rights by another union, there is no evidence before us to suggest that a specific promise to that effect was made to the employees. Even if we were to accept as correct Mr. Scott's statement that the employee who drafted the Portuguese version of the statements of desire, Mr. J. Camarata, employed the language he did so as to assure employees that "we were changing unions and wouldn't be going as a non-union plant" (Mr. Camarata himself was not questioned on this point), nevertheless, this does not indicate that any guarantee was made to employees that no gap in representation might occur. It is perhaps worth noting in this regard that Mr. Camarata was not involved in getting employees to sign the statements of desire. There being no direct evidence to establish that employees were promised that any termination of the respondent's bargaining rights would be followed by an immediate acquisition of these bargaining rights by another union, we decline to find that any such condition was attached to the signing of the statements of desire.

12. Having regard to the above determinations, we are satisfied that the statements of desire filed in this matter qualify as written significations by employees that they no longer wish to be represented by the respondent, and that such statements of desire have been filed on behalf of more than forty-five per cent of the employees in the bargaining unit. Having come to this conclusion we now turn to consider the question of the voluntariness of the statements of desire.

13. The Board in inquiring into the voluntariness of statements of desire is well aware that because of the nature of the employer-employee relationship an employee is particularly vulnerable to influences which might operate to impair the free exercise of his rights under the Act. Because of this, before it will accept any statements of desire as being voluntary the Board seeks to assure itself that employees did not sign them as a result of real or imagined employer pressure or out of either a desire to ingratiate themselves with management or out of a fear of possible retaliation where it is reasonable for them to assume that management may learn which employees did and did not sign. In performing this task, the Board closely examines the circumstances concerning the origination, preparation and circulation of the statements of desire before it.

14. There is nothing in the evidence which suggests that the employer initiated the suggestion that employees seek to terminate the respondent's bargaining rights. Rather, the evidence indicates that the idea originated with the employees themselves with the impetus for actually putting the idea into action being supplied by Mr. Scott and Mr. Anderson. The original suggestion of preparing statements of desire did not, however, come from the employees. Rather, the suggestion came from Mr. Ellis of the Food and Allied Workers. Mr. Ellis did not testify before the Board. The Board has in the past expressed concern where an employee whose idea it was to initiate a statement of desire does not testify in support of the statement of desire. The Board's concern in this regard is that it be able to assess whether the circumstances surrounding the origination of the statement of desire arose as a result of the voluntary wishes of that employee. (See *Marsh Frozen Foods Limited* [1970] OLRB Rep. Sept. 649). Mr. Ellis, however, is not an employee of the employer but rather is an official of a large and active trade union. Because of this, we are not willing to assume that Mr. Ellis might somehow have been influenced by the employer when he suggested the preparation of the statements of desire. Similarly, we do not believe that Mr. Ellis could reasonably have been regarded by any of the employees as being either an agent of their employer or someone who might be able to influence their employment prospects. (For a somewhat analogous situation see *St. Catharines Building Supplies Limited* [1976] OLRB Rep. June 321).

15. The English version of the statements of desire was drafted by Mr. Scott, the Portuguese version by Mr. Camarata, and the Italian version by Mr. Pera. The various xerox copies of the originals were made by Mr. Scott. We are satisfied that these actions were taken without the support or knowledge of the employer.

16. Mr. Scott, Mr. Anderson and Mr. Pera testified concerning the circumstances under which the statements of desire came to be signed. We found all three gentlemen to be credible witnesses. Their testimony was to the effect that Mr. Scott, after xeroxing copies of the statements of desire, signed up a number of employees and then handed the documents over to Mr. Anderson for the same purpose. At the end of his shift, Mr. Anderson gave the documents to Mr. Pera who in turn obtained some additional signatures before giving the documents back to Mr. Scott. Mr. Scott later signed up one more employee. The evidence indicates that all of the employees who signed the statements of desire did so in circumstances where their actions were not likely to be observed by members of management. All three of these witnesses indicated that they could not identify with certainty each of the signatures they had been responsible for obtaining. Despite this failing, however, the Board is satisfied that all of the statements of desire were signed in the presence of either Mr. Scott, Mr. Anderson or Mr. Pera under circumstances where employees would not reasonably expect that they were being observed by members of management.

17. In his submissions, counsel for the respondent noted that in his testimony Mr. Pera had been uncertain as to who had given him the statements of desire so that he could collect signatures on them, although he did remember that when he was finished he had given the documents to Mr. Scott. Despite this, we are satisfied from Mr. Anderson's evidence that he was the one who had given the documents to Mr. Pera. Another factor relating to the custody of the statements of desire which counsel pointed to was the fact that for a time the statements of desire had been held by Mr. Ellis who did not testify before the Board. The Board has generally placed considerable importance on hearing direct evidence as to the custody of a statement of desire from the time of its physical preparation to its actual delivery at the Board. (See *Mac-Wood Machine Limited* [1975] OLRB Rep. Nov. 842).

This is done so that the Board can assure itself that management played no role with respect to its origination or circulation and that it did not come into the possession of management. In the instant case we have no direct assurance that the completed statements of desire did not somehow become available to the employer during the period when they were left in Mr. Ellis' custody. However, again, having regard to the position of Mr. Ellis with the Food and Allied Workers, we consider such a possibility to be so remote that we are not prepared to find that the failure of Mr. Ellis to testify in this regard to be fatal to the acceptability of the documents.

18. Mr. Anderson and Mr. Scott testified that on several occasions they had been approached by foremen they were friendly with and asked what was going on with respect to the proposed change in unions. They testified that the foremen involved appeared to want only to satisfy their own personal curiosity, that there was no discussion of the actual steps being taken by the employees, and that no attempts were made by the foremen to influence them. Mr. Scott also testified that on the day that Mr. K. Lee, the employer's personnel manager, left the Company's employ, he asked of Mr. Scott "what's this I hear about changing unions". When Mr. Scott replied that this was so, Mr. Lee responded that he should "be careful". Mr. Scott also stated that on one occasion when he attended at a grievance meeting in his capacity as a steward, he was warned by Mr. S. Leader, the employer's plant manager, that he had better watch his step. Counsel for the respondent contended that the interest demonstrated by managerial personnel with respect to the attempts to displace the respondent could only be interpreted as managerial interest in the success of the application.

19. The Board's position with respect to applications such as this is that the Board must be satisfied that any attempt to terminate a union's bargaining rights not be influenced by managerial personnel. The Board is particularly mindful that frequently foremen in relatively informal work environments may influence employees without even meaning to, and that attempts by a foreman to elicit information in order to satisfy his own natural curiosity about occurrences in the workplace might be misinterpreted by an employee. In the instant case, however, we are fully convinced on the evidence that prior to any discussions with the foremen, both Mr. Scott and Mr. Anderson had already voluntarily decided to seek to change unions and that this decision had been based only upon their personal conviction that they would prefer to be represented by another trade union. As to the warnings to Mr. Scott by Mr. Lee and Mr. Leader, because of the background of this case, it is difficult to determine just what inferences, if any, should be drawn from them. Mr. Scott suggested that the warnings might have been in response to certain actions of officials of the respondent. While we decline to give any weight to certain hearsay statements concerning an alleged phone call to the employer, we do accept the uncontradicted evidence of Mr. Scott that sometime after midnight one night two named representatives of the respondent arrived at the employer's premises and threatened to seek to have Mr. Scott discharged because of his activities against the union. In these circumstances we are not willing to assume that the warnings of Mr. Lee and Mr. Leader are indicative of management support of the application.

20. We have set out above a number of the factors we considered in assessing the voluntariness of the statements of desire. In looking at these factors we were influenced by the credibility of the witnesses called in support of the statements of desire. Of equal importance was the fact that we were satisfied that the persons responsible for originating, prepar-

ing and circulating the statements of desire were motivated not by any managerial influence, fear of management or desire to ingratiate themselves with management, but rather by a desire to replace their existing bargaining agent by another, and that this was the basis of their approach to other employees. Having regard to these considerations, and to our conclusions set out above, we are prepared to accept the statements of desire as being voluntary significations of the employees who signed them. Before leaving this point we would note that counsel for the respondent referred the Board to a number of earlier Board cases which dealt with statements of desire filed in opposition to applications for certification. In those cases, unlike the one before us, one of the factors confronting the Board in seeking to assess the voluntariness of the statements was the fact that a number of persons who had only a short time before signed applications for membership in a trade union had now turned around to oppose that very same union. Because a statement of desire filed in support of an application under section 49 does not represent the same sudden "change of heart" as does a statement of desire filed in support of an application for certification, the Board is less inclined to draw inferences adverse to the voluntariness of a statement filed in support of an application under section 49 of the Act. (See *N-J Spivak Limited*, File No. 0081-77-R (as yet unreported) July 15, 1977).

21. Having regard to the matters dealt with above and to all of the evidence before us, the Board finds that not less than forty-five per cent of the employees of Standard Brands Canada Limited in the relevant bargaining unit at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on June 17, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 49(3) of the Act.

22. The Board directs that a representation vote be taken of employees of Standard Brands Canada Limited. All employees of Standard Brands Canada Limited at its plant located at 2463 Royal Windsor Drive, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, on the date hereof who have not voluntarily terminated their employment or who have not been discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

23. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Standard Brands Canada Limited.

24. The matter is referred to the Registrar.

0316-77-U International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Complainant), v. Windsor Tube & Metal Inc., (Respondent).

Certification – Membership Evidence – Timeliness – Bargaining Unit – Whether number of employees in unit is determined on date on which application is made or at the exact time of mailing

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members M. J. Fenwick and W. H. Wightman.

APPEARANCES: *H. Carl Anderson and Ken Simpson for the applicant; Robert D. Howe, Gignac Sutts and John Kornelsen for the respondent.*

DECISION OF THE BOARD: August 9, 1977

1. The name: "Windsor Tube and Metal Incorporated" appearing in the style of cause of this application as the name of the respondent is amended to read: "Windsor Tube & Metal Inc.".

2. The respondent is a metal tube manufacturer which at the relevant time employed some 11-12 hourly employees (including the complainants) of whom 9 were on day shift. The owner-President is a Mr. Zekelman, Mr. Emil Wilk is Plant Manager, Mr. John Kornelsen is Comptroller and Mr. Gary Duffy is General Foreman. The Company has been operative for some two and one-half years.

3. On May 10, 1977, the 7 grievors here involved were late returning from their lunch break as a consequence of having left the plant to seek a solution to what they perceived to be a problem in respect to their wages and working conditions. On their return to the plant they found their time cards had been removed from the rack and their employment terminated. This is an application under section 79 alleging such termination of employment to have been in contravention of section 58(a) of the Act.

4. On May 10, 1977, during the hourly lunch break in the lunchroom, the complainants discussed a statement by Wilk that they would be going on to a six-day, 10-hour per day operation and exchanged their individual feelings of dissatisfaction over the rates of pay and conditions. They "wanted to do something about it but didn't know how to go about it". They discussed going to the Labour Relations Board to complain about wages and conditions or possibly unionization.

5. At lunch time on May 11, 1977, they intended to drive downtown to "try and get a union". Before leaving it was suggested they should talk to the one other male hourly employee, a Garry Ruggaber. Accordingly, two of them – Claude McGraw and Mike Chamberlain – approached Ruggaber and asked him if he wanted to join a union. Ruggaber laughed a little and said "why don't you talk to Gary Duffy – he's a cool head and will tell you how to go about it". Ruggaber stated that if they wanted to hold a meeting they should do it after work some night: McGraw could not recall this statement.

6. In any event, McGraw and Chamberlain did, shortly after the start of the lunch period at 12.10, go to a room used by Duffy as an office and also used as a lunchroom regu-

larly by Duffy, Ruggaber and the remaining hourly employee, an Anne Sullivan. McGraw was the principal, if not the only, spokesman in the conversation with Duffy. McGraw's account of that meeting was that he opened the conversation with, "what do you think of getting a union" to which he says Duffy replied "first of all you're going about it the wrong way". McGraw then mentioned that he knew John Moynahan, President of Local 195 U.A.W. and Duffy said "go see him then". McGraw states that Duffy's attitude then changed and Duffy said "I can fire you guys one by one for just thinking of getting a union in here. It's my duty to report this – that's what I'm here for". McGraw states that he told Duffy "to cool it" because he was getting a little hyper. McGraw thought that they were going to be fired one by one so the only thing to do was to join Local 195 and he told Duffy "we would go and join a union", who replied, "when you come back the door will be locked".

7. Duffy's account of this discussion in his evidence-in-chief was that McGraw asked him if they could hold a meeting and he replied, "there's no problem with a meeting as long as it is on your time. No problem at all" and that he also told them that permission to leave was out of his hands and they would have to talk to Wilk. On cross-examination, Duffy said there was no mention of union but he did admit that McGraw said he would talk to John Moynahan (who was well known to Duffy as President of Local 195 by his own admission). Duffy further testified that McGraw did not say what he would talk to Moynahan about. Duffy denied that he had made the statement about firing the employees for talking about the union. Duffy's summation of the conclusion of the meeting was that "when they left the office everything was straightened out and quieted down".

8. Ruggaber, who was present throughout the discussion, stated specifically on cross-examination that there was no talk about a union nor was there any discussion of John Moynahan. He also stated that Duffy had a "friendly attitude" throughout. In the light of Duffy's statement, relative to the discussion of Moynahan, we can give no weight to Ruggaber's testimony and in the total context of events we prefer McGraw's account of the meeting over Duffy's.

9. In any event, the evidence establishes that there was indeed some discussion about unionizing, as can be the only conclusion to be drawn from the introduction of Moynahan's name into the conversation. As to whether Duffy made the statement that he could "fire them one by one", may be problematical but it is clear from the subsequent events that whatever was said was interpreted by McGraw as indicating that they no longer had any way back.

10. On termination of the discussion with Duffy, McGraw and Chamberlain rejoined the rest of the group and reported that "we did not have a chance. We're going to get fired one by one so we might as well do something now". They all left the plant and went downtown to the Manpower office, who referred them to the Department of Labour offices, who referred them to John Moynahan who, in turn, referred them to a Mr. Ken Simpson, an International Representative for the U.A.W. In Simpson's office they all made an application for union membership and paid the fee. Simpson then "instructed them all to return to the plant immediately to see if the Company would allow them to go back to work", which he was doubtful about because of overstaying the lunch hour.

11. The employees then returned to the plant, according to Duffy, just before the

afternoon break, around 2.00 p.m. There is some variation in statements regarding the time but we can accept it was between 2.00 p.m. and 2.30 p.m.

12. Meanwhile, when the 7 employees had not returned at the end of the lunch period, Duffy located Wilk in Kornelsen's office where they were having lunch and informed them the employees had not returned after lunch. Wilk and Duffy immediately went out to the plant and while walking around the plant, Wilk states he asked Duffy "if he knew any reason they went out or why they didn't come back", to which Duffy replied that he had no reasons. It should be noted that Duffy makes no mention of this conversation in his evidence-in-chief and on cross-examination testified only that he couldn't remember whether, at the immediately following meeting between Kornelsen, Wilk and himself, he was asked if he had any idea why the employees left. Duffy did testify on cross-examination that he asked Wilk if the employees had got permission from him to leave the building to which the reply was in the negative.

13. Wilk and Duffy walked down to Ruggaber who was at work and he told Wilk he knew nothing at all as to why the men weren't back.

14. Wilk and Duffy returned to Kornelsen's office to discuss the matter and Wilk made the decision to pull their time cards. This decision was made about 1:00-1:10 p.m. and cards were removed about 1:15-1:30 p.m. Wilk, Duffy and Kornelsen are all agreed that at this meeting there was no discussion of union organization, although Kornelsen in his testimony states they did discuss why the employees had left and why they didn't return without arriving at a conclusion.

15. Kornelsen, in answer to the obvious speculation as to why Duffy would not have communicated to Wilk about his prior meeting with employees, laid it down to the fact that Duffy and Wilk didn't get along well and that might create a communications problem. Kornelsen, when re-called, also testified that Wilk a strong disciplinarian and very production-oriented whereas Duffy was friendly, genial, and almost too friendly with the workers.

16. Wilk was quite forthright in his testimony that the decision to pull the time cards was his and his alone, although he thought the others agreed with him, and that at the time he had no knowledge of organization activities but was motivated by maintaining discipline.

17. When the 7 employees returned to the plant they met Duffy and told him they were ready to come back to work and Duffy replied "I'm sorry we don't have any more work for you". Wilk joined the group and Duffy left. Wilk told them that they hadn't been fired, they had quit. They told Wilk that they had gone out to hold a meeting and their intentions were to return. Wilk testified that they did not tell him the purpose of the meeting. Wilk also testified that in response to a query from one of the employees as to why he didn't give them a second chance, he replied "no, they didn't give me any chance to do anything about it, so why should I give them one". After some further discussion Wilk gave the group fifteen minutes to leave or he would call the police. The evidence of Kemp, one of the discharged employees, was that during the course of the discussion with Wilk, after Wilk had said that he was the man to see about time off, McGraw replied that Wilk wouldn't have given them time off to go down there. Wilk's reply was stated to be, "no, I wouldn't because I don't want no union in here at all". This episode was not mentioned in McGraw's testimony.

18. We do not find it credible that during the discussion between Wilk, Kornelsen and Duffy which concentrated on the central question of the reason behind the employees' leaving of the plant and their failure to return that Duffy would not have reported on his prior meeting with McGraw. Duffy himself offers a number of explanations such as when the meeting concluded everything was "straightened out and quieted down": or that there had only been McGraw and Chamberlain involved in that discussion and he didn't know how the discussion affected the other employees: or that it was because McGraw in effect had suggested "we won't even mention this". Kornelsen in his evidence suggested that perhaps the breakdown in communications sprung from personality differences between Wilk and Duffy, with Wilk being described as very production-oriented and Duffy being more friendly – "perhaps even too friendly". The very multiplicity of explanations connotes too much protestation and we believe that this prior meeting must have been included in the discussions.

19. The question is whether these employees were terminated for over-staying their lunch period solely or was there a secondary reason, namely, their desire to join a union. In our view, it is significant that the actual decision to remove the time cards was taken some 20-30 minutes after the end of the lunch period and at a time when the only information available to management about their activities would have to come from Duffy. It is significant that no effort was made to distinguish between the discipline afforded a seniority employee or a probationary employee – it was a mass judgement. It is also significant that on the return of the employees to the plant, no effort was made by management to seek an answer to the question they had puzzled over as to what was the reason for their leaving the plant in the first place. Indeed, in respect to this latter aspect, Wilk's own testimony is to his response to a question from one of the employees as to "why don't you give us a second chance" was "no, they didn't give me any chance to do anything about it, so why should I give them one".

20. We find that the respondent has failed to establish on the balance of probabilities that the reason for the termination of the complainants was solely for business reasons unrelated in any way to the exercise of their rights to join a trade union of their choice. The Board further finds that termination was in contravention of section 58(a) of the Act and directs the respondent to re-instate the complainants to their employment forthwith and that they be compensated for lost wages resulting from their termination. The Board will remain seized of this matter in the event the parties are unable to agree upon the exact amount of compensation owing to each of the complainants.

**0614-77-M Unifin Division of Keeprite Products Limited, (Employer), v.
International Union, United Automobile Aerospace and Implement Workers
of America, (U.A.W.) and its Local 27 (Trade Union).**

**Reference – Collective Agreement – Whether sufficient evidence of agreement in writing –
Effect of Anti Inflation legislation requirements.**

BEFORE G. Gail Brent, Vice-Chairman and Board Members J. D. Bell and H. Simon.

APPEARANCES: *Janice A. Baker and G. T. Fenwick for the employer; Ken Petryshen for the trade union.*

DECISION OF THE BOARD: August 18, 1977

1. This is a reference by the Minister of Labour, under section 96 of the Act of the question whether the Minister has authority under the Act to appoint a person to constitute a Board of Arbitration in the instant case.

2. From the documents received by the Deputy Minister and filed with the Board and from the submissions made at the hearing the only matter to be resolved is whether there exists a collective agreement between the parties.

3. At the commencement of these proceedings Mr. Petryshen, on behalf of the Union, requested an adjournment as counsel for the union was in Ottawa appearing before the Canada Labour Relations Board. The adjournment was opposed by the Company as being contrary to Board policy and prejudicial to the interests of the Company under the circumstances. The parties being unable to agree on the matter of an adjournment, the Board ruled that it would follow its normal practice in these matters and no adjournment was granted. Mr. Petryshen then withdrew as he had no instructions on how to proceed.

4. The sequence of events as recounted by Mr. G. T. Fenwick, the Employer's General Manager, and as revealed by the documents filed with us is summarized as follows. On November 5, 1976, the last admitted collective agreement between the parties expired. This agreement had contained a monetary settlement which was rolled back by the Anti-Inflation Board. The A.I.B. ruling had also determined the maximum level of increase which the parties could agree to in the first year of their next collective agreement. The A.I.B. ruling was appealed, and insofar as we know it is still progressing through one of the avenues of appeal available under the relevant legislation.

5. The parties delayed negotiations for a new collective agreement until the original reference to the A.I.B. was determined and hence began negotiations five days before the expiry of their old collective agreement. Negotiations continued through late 1976 and early 1977. In the meantime the parties met with a conciliation officer, a "no Board" report was issued and there was a legal strike which lasted from January 12, 1977 to February 21, 1977. Before and during this strike the parties continued meetings to try to resolve their differences. As the parties agreed to various items they would initial the page containing that item. By the 16th or 17th of February they had agreed on everything except the date this new proposed agreement would come into effect. The Company wanted November 6, 1976, the Union wanted a date in October. The Union agreed to put the terms of their proposed

agreement to a vote of their members and to put the two dates before their members for a final choice.

6. On Saturday, February 10, 1977 Mr. Fenwick was notified by telephone that the members of the Union local had voted to accept the proposed agreement, to make it effective November 6, 1976, and to return to work on Monday, February 21, 1977. The Employer prepared a clause which showed the November 6th effective date and this was initialled by the representatives of both parties. Following this the Employer gathered together the initialled pages and combined them into one document which it presented to the Union. The Union agreed that these were the terms they had initialled and settled during the course of negotiations but failed to appear at any of the meetings set up by the Employer to formally execute the document.

7. On April 7th and June 6th, 1977 the Employer received letters from R. Nickerson, International Representative of the Union stating that the Union would not sign any agreement until the final decision of the latest appeal under the Anti-Inflation legislation. From the time of the end of the strike until it received the first of these letters the Employer had considered itself bound by the terms of their new settlement. Wages were paid in accordance with the new settlement, there was check-off of Union dues and grievances were being processed by the parties.

8. In April, 1977 the Employer discharged two employees. Grievances were filed by them, but the Employer has refused to agree to the appointment of an arbitration because it says that there is no collective agreement between itself and the Union. The Union on the other hand requested the Minister to exercise her discretion and appoint an arbitrator.

9. It is our finding that there is a collective agreement between the parties, that that agreement is to be found in the initialled clauses agreed to by the parties, and that it came into effect on November 6, 1976. The reasons for this decision are set out in the following paragraphs.

10. The Act defines collective agreement as follows in section 1(1)(e):

“1.(1) In this Act,

- (e) “collective agreement” means an agreement in writing between an employer or an employers’ organization, on the one hand, and a trade union that, or a council of trade unions that, represents employees of the employer or employees of members of the employers’ organization, on the other hand, containing provisions of employment or the rights, privileges or duties of the employer, the employers’ organization, the trade union or the employees;”.

This has been interpreted to mean that a collective agreement must be signed by the parties to “evidence the agreement in writing”. In determining what is an adequate signature or acknowledgement of the agreement reference should be made to an earlier decision of this Board in *United Electrical Radio and Machine Workers of America, v. Marsland Engineering Limited*, [1970] OLRB Rep. 133 at 140 paragraph 16 which states:

...The only way that an individual can evidence his agreement in writing is by signing his name *or* perhaps by signing his initials to a document which contains or identified the provisions agreed to in such a manner that his intent to consummate the agreement is clear.

(Emphasis added)

11. This above passage appears to fit the situation at hand perfectly. The parties here clearly signed their initials to a series of clauses which in their entirety they intended to constitute the agreement between them. The people who initialled the various clauses were officers or officials of the respective parties. As further evidence of the collective agreement the parties implemented the terms of the settlement, Union dues were remitted according to the terms of the settlement and the parties processed grievances before the status of the settlement was questioned. Therefore there is ample evidence to support the inference that the parties have ratified their agreement. Hence we have before us a signed settlement in writing between an Employer and a Union which the parties have ratified by their subsequent actions. Accordingly their settlement must be taken to fulfill the statutory definition of collective agreement.

12. The only possible impediment to calling this a collective agreement would be the complications introduced into the determination of these questions by the Anti-Inflation legislation. In particular one must determine whether the parties in any way made the status of their settlement as a collective agreement conditional upon the approval of some external body administering the Anti-Inflation programme of the federal government as in *Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America v. Silverwood Dairies Division of Silverwood Industries Limited v. Office and Professional Employees International Union, Local 473 (Intervener)*, [1977] OLRB Rep. 177. Upon considering the clauses tendered in evidence there is no apparent intent to make this agreement conditional on approval by such an external body. If anything this case may be more similar to the situation in *Ferranti-Packard Limited v. United Steelworkers of America, Local 5788 and J. C. Adams*, [1977] OLRB Rep. 169 where the parties have specifically adverted their minds to the Anti-Inflation situation and dealt with the possibility in Article 24 of their settlement which reads as follows:

Article 24

24.01. As a result of the order of the Administrator affecting the Collective Agreement which applied during the period October 2, 1975 to November 5, 1976, the cost of living allowance was reduced from \$.57 to \$.26 per hour. Commencing November 1, 1976 the cost of living allowance shall be \$.26 per hour. The order of the Admin. is presently under appeal by the Union and, upon a decision being reached on this appeal the parties agree to implement any award as it applies to the above reduction in the cost of living allowance.

13. It is therefore our conclusion that there is a collective agreement between the parties and that the Minister has authority under the Act to appoint a person to constitute a Board of Arbitration.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1977

BARGAINING AGENTS CERTIFIED DURING JULY

No vote Conducted

0163-76-R: Canadian Union of Public Employees (Applicant) v. Corporation of the County of Oxford (Respondent).

Unit: "all employees of the respondent in its day nurseries in the County of Oxford save and except the administrator of social services, assistant administrator, supervisors, persons above the rank of supervisor, office, clerical and technical staff, supply teachers and students employed during the school vacation period." (16 employees in the unit).

2056-76-R: Ontario Nurses' Association (Applicant) v. Hawkesbury and District General Hospital (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at the Hawkesbury and District General Hospital, Hawkesbury, save and except the Director of Nursing and persons above the rank of Director of Nursing." (28 employees in the unit). (*Clarity note – see Report of full decision (1977) OLRB Rep. July.*)

Unit #2: "all registered and graduate nurses employed in a nursing capacity at the Hawkesbury and District General Hospital, Hawkesbury, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in the unit).

2193-76-R: London & District Service Workers' Union, Local 220 (Applicant) v. The Regional Municipality of Haldimand-Norfolk, (Morview Home for the Aged) (Respondent).

Unit: "all office and clerical employees of the Regional Municipality of Haldimand-Norfolk at Norview Home for the Aged, Simcoe, save and except supervisors and persons above the rank of supervisor and the receptionist-secretary." (3 employees in the unit).

0039-77-R: Ontario Nurses' Association (Applicant) v. Lyndhurst Hospital (Respondent).

Unit: "all registered and graduate nurses of the respondent in Metropolitan Toronto engaged in a nursing capacity save and except head nurses and persons above the rank of head nurse, persons regularly employed for not more than twenty-four hours per week and employees covered by a subsisting collective agreement with the Service Employees Union." (29 employees in the unit).

0107-77-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Paxton Transport Ltd. (Respondent).

Unit: "all employees of the respondent working at and out of Peterborough, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, dispatchers, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (18 employees in the unit). (*Having regard to the agreement of the parties.*)

0195-77-R: Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. Corporation of the City of Orillia (Respondent).

Unit: "all office and clerical workers of the respondent at Orillia, Ontario, save and except supervisors, persons above the rank of supervisor, secretaries to the mayor, to the clerk administrator and to the city engineer, students employed during the school vacation periods, persons regularly employed for not more than 24 hours per week and persons covered by subsisting collective agreement." (36 employees in the unit). (*Having regard to the agreement of the parties*).

0296-77-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Public General Hospital Society of Chatham (Respondent).

Unit: "all employees of the Public General Hospital Society of Chatham, in Chatham, Ontario, who are regularly employed for not more than 24 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dieticians, undergraduate dieticians, technical personnel, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, chief engineer, students employed during the school vacation period and persons covered by subsisting collective agreements." (74 employees in the unit).

0317-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management (Respondent).

Unit: "all employees of the respondent engaged in its Central Maintenance division working at or out of the respondent's shop located at 144 Vanderhoof Avenue, Toronto, Ontario, save and except supervisors and persons above the rank of supervisors, office and sales staff, and students employed during the school vacation period." (81 employees in the unit).

0319-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Birmingham Construction Ltd. (Respondent).

Unit: "all pile drivers employed by the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note - see Report of full decision (1977) OLRB Rep. July*).

0373-77-R: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local 352 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coupco Division, Algonquin Mercantile Corporation (Respondent).

Unit: "all employees of the respondent working at or out of Metropolitan Toronto, save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period." (15 employees in the unit).

0412-77-R: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Applicant) v. St. Michael's Shops of Canada Limited (Operating as Marks and Spencer) (Respondent).

Unit #1: "all employees of the respondent at its retail stores in Oshawa, save and except supervisors and persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the vacation period." (7 employees in the unit).

Unit #2: "all employees of the respondent at its retail stores in Oshawa regularly employed for not

more than 24 hours per week, save and except office staff solely employed as such.” (3 employees in the unit).

0429-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Anthes Equipment Limited (Respondent).

Unit: “all employees of the respondent working at and out of Hamilton, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office and sales staff and students employed during the school vacation period.” (13 employees in the unit).

0430-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. T. G. Gale Limited (Respondent).

Unit: “all employees of T. G. Gale Limited at Oshawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff.” (66 employees in the unit). (*Having regard to the agreement of the parties*).

0433-77-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Traugott Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in the unit).

0444-77-R: Ontario Nurses’ Association (Applicant) v. McKenzie Nursing Home Limited (Downtown Convalescent Centre) (Respondent) v. Group of Employees (Objectors).

Unit: “all registered and graduate nurses employed by the respondent at Hamilton, in a nursing capacity, save and except the Director of Nursing and persons above the rank of Director of Nursing.” (16 employees in the unit).

0458-77-R: Amalgamated Clothing and Textile Workers Union (Applicant) v. Levi Strauss of Canada Inc. (Respondent).

Unit: “all employees of the respondent at Hamilton, Ontario, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, instructors, designers, sales and office staff, maintenance personnel, quality auditors, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period.” (190 employees in the unit). (*Having regard to the agreement of the parties*).

0469-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Ellis – Don Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

0470-77-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Collavino Brothers Construction (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0472-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227, and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dominion Stores Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. July.*)

0479-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. W. G. How (Toronto) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0480-77-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Jim Walter Building Products Ltd. (Respondent).

Unit: "all employees of the respondent at Barrie, save and except foremen, persons above the rank of foreman, office and sales staff." (110 employees in the unit). (*Having regard to the agreement of the parties*).

0483-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Newcor Canada Ltd. (Respondent).

Unit: "all employees of the respondent employed at its plant at 3126 Devon Road, Windsor, Ontario, save and except office and sales staff, purchasing staff, engineering department staff, foremen, those above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (40 employees in the unit). (*Having regard to the agreement of the parties*).

0502-77-R: Christian Labour Association of Canada (Applicant) v. Saccucci Forming Company Ltd. (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the Townships of Shawanaga, Burpee, Carling, Ferguson, McDougall, Foley and Cowper in the District of Parry Sound, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

0505-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. V. K. Mason Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Renfrew, save

and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0506-77-R: United Steelworkers of America (Applicant) v. Modular Windows of Canada Limited (Respondent).

Unit: "all employees of the respondent at Concord, Ontario save and except foremen, persons above the rank of foreman, office and sales staff." (63 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. July*).

0513-77-R: Canadian Union of Public Employees (Applicant) v. Ajax and Pickering General Hospital (Respondent).

Unit: "all office and clerical employees employed by the respondent in the Town of Ajax, save and except supervisors, persons above the rank of supervisor, Director of Personnel, Accountant, confidential secretaries to the Administrator, to the Assistant Administrator, to the Director of Nursing, to the Director of Finance, to the Director of Purchasing, the confidential clerk to the Director of Nursing and persons covered by subsisting collective agreements." (43 employees in the unit). (*Having regard to the agreement of the parties*).

0515-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. E. G. M. Cape & Company Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0517-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Williams Excavating (Respondent).

Unit: "all employees of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0519-77-R: The Employees' Association of Milltronics Limited (Applicant) v. Milltronics Limited (Respondent).

Unit #1: "all employees of the respondent at Peterborough save and except supervisors, persons above the rank of supervisor, office and clerical employees, salesmen, professional engineers and product specialists." (61 employees in the unit).

Unit #2: "all office and clerical employees of the respondent at Peterborough save and except supervisors, persons above the rank of supervisor, accounting staff, salesmen, professional engineers and product specialists." (16 employees in the unit).

0524-77-R: The Hotel and Club Employees' Union, Local 299 of Hotel and Restaurant Employees' and Bartenders' International Union (Applicant) v. The Prince Hotel (Toronto) Limited (Respondent).

Unit: "all banquet waiters, waitresses, bartenders, housemen and captains of the employer at the Prince Hotel in the Municipality of Metropolitan Toronto, save and except persons regularly em-

ployed for not more than 24 hours per week, students employed during the school vacation period and employees covered by a subsisting collective agreement between the Hotel and Club Employees' Union, Local 299 of Hotel and Restaurant Employees' and Bartenders' International Union and The Prince Hotel (Toronto) Limited." (60 employees in the unit). (*Having regard to the agreement of the parties*).

0526-77-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Centres of Ontario Limited (Respondent).

Unit: "all employees of the Respondent employed at the Golden Years Rest Home, 104 Brant Ave., Brantford, Ontario, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

0527-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. Perucci Masonry (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0528-77-R: Oil, Chemical and Atomic Workers International Union (Applicant) v. Union Carbide Canada Limited (Respondent).

Unit: "all employees employed in the Gas Products Division of the respondent in the City of Sarnia save and except foremen, persons above the rank of foreman, technicians, office and clerical staff, sales staff and students employed in a co-operative training programme." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0533-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Advanced Carpentry Incorporated (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in the unit).

0539-77-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Stoney Creek Dairies Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent at Stoney Creek, Ontario, save and except office manager and persons above the rank of office manager." (7 employees in the unit).

0540-77-R: International Association of Machinists and Aerospace Workers (Applicant) v. Toledo Scale, Division of Reliance Electric (Respondent).

Unit: "all employees of the respondent in Sudbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (3 employees in the unit).

0544-77-R: Local Union 785 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Participation House Brantford (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0549-77-R: International Union of Operating Engineers, Local 796 (Applicant) v. Trizec Equities Limited (Respondent).

Unit: "all employees of the respondent at its location 180 Wellington Street West, Toronto, Ontario engaged in building operations and maintenance, save and except superintendent, persons above the rank of superintendent, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in the unit). (*Having regard to the agreement of the parties*).

0550-77-R: Ontario Nurses' Association (Applicant) v. Delaware Nursing Home (1977) Inc. (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by the respondent at its nursing home in Delaware, Ontario, save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than 24 hours per week." (6 employees in the unit).

0555-77-R: United Steelworkers of America (Applicant) v. Canadian A. S. E. Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent Company in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (229 employees in the unit).

0558-77-R: Christian Labour Association of Canada (Applicant) v. Delhi Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Delhi, Ontario, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

0559-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kalabria General Contractors Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0570-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Goldie-Burgess Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0572-77-R: Christian Labour Association of Canada (Applicant) v. Tecumseth Insulation Services Limited (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

0585-77-R: Service Employees Union, Local 478 A.F. of L., C.I.O., C.L.C. (Applicant) v. Cochrane Nursing Homes Limited (Respondent).

Unit: "all employees regularly employed at Cochrane Nursing Homes Limited, 411-11th Avenue, North Cochrane, Ontario for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, graduate dietitians, graduate and undergraduate pharmacists, technical personnel, office and clerical staff and persons covered by subsisting collective agreements." (18 employees in the unit).

0586-77-R: Service Employees Union, Local 478 A.F. of L., C.I.O., C.L.C. (Applicant) v. St. Joseph's General Hospital (Respondent).

Unit: "all office and clerical employees of St. Joseph's General Hospital, 720 McLaren Street, North Bay, Ontario, save and except the religious Sisters, technical personnel, secretary to the Administrator, secretary to the Assistant Administrator, secretary to the Director of Nursing and the Secretary of the Director of Personnel, Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during vacation periods, employees covered by existing collective agreements and certificates of the Board." (51 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision (1977) OLRB Rep. July*).

0590-77-R: Ontario Housing Employees, Local 767, CUPE, OFL, CLC (Applicant) v. Treal Maintenance Ltd. (Respondent).

Unit: "all maintenance and groundskeeping employees of the respondent employed at the Flemingdon Park, Ontario Housing Project, 747 Don Mills Road, Don Mills, save and except students employed during the school vacation periods." (16 employees in the unit). (*Having regard to the agreement of the parties*).

0597-77-R: Labourers' International Union of North America, Local 247 (Applicant) v. Beaver Seaway Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit).

0599-77-R: Canadian Paperworkers Union (Applicant) v. Continental Group of Canada Limited (Respondent).

Unit: "all office and clerical employees of the respondent at Guelph, Ontario, including employees engaged in sales correspondence, save and except supervisors, persons above the rank of supervisor, salesmen and sales trainees, secretary to the plant manager, industrial relations assistant, students

employed during the school vacation period and persons covered by a subsisting collective agreement between the Continental Group of Canada Limited and the Canadian Paperworkers Union Local 1199." (15 employees in the unit).

0615-77-R: Kenebuc Employees' Association (Applicant) v. Kenebuc (Galt) Limited (Respondent).

Unit: "all employees of the respondent at Cambridge, Galt, save and except foremen, persons above the rank of foreman, and office staff." (15 employees in the unit).

0657-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. R. C. R. Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

2155-76-R: United Brotherhood of Carpenters & Joiners of America, A.F.L., C.I.O., C.L.C. (Applicant) v. Viceroy Construction Company Limited (Respondent).

Unit: "all employees of the respondent employed at its plant in Metropolitan Toronto, save and except foremen, persons above the rank, office and sales staff." (00 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	67
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	36

0460-77-R: International Woodworkers of America (Applicant) v. Weldwood of Canada Limited (Respondent).

Unit: "all bush employees of Weldwood of Canada Limited, in the District of Muskoka, Ontario, save and except foremen, persons above the rank of foreman, log scalers, office and sales staff, jobbers and jobbers employees, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2

Applications Certified Subsequent to Post-Hearing Vote

1864-76-R: The Employees' Association of Canron Limited (Applicant) v. Canron Limited, Eastern

Structural Division (Respondent) v. International Association of Bridge, Structural & Ornamental Ironworkers, Local Unions 700, 721, 736, 765 and 786 (Intervener #1) v. Canadian Workers Union (Intervener #2) v. Employees (Objectors).

Unit: "all employees of the respondent engaged in the fabrication of iron, steel and metal products, including maintenance work, in connection therewith at the respondent's shop, located at the respondent's premises in Metropolitan Toronto, save and except office, clerical and sales employees, watchmen guards, foremen and persons above the rank of foreman, students employed during the school vacation period, employees engaged in erection, installation or construction work and persons covered under subsisting collective agreements between the Ontario Erectors Association and the International Association of Bridge, Structural and Ornamental Ironworkers Local Union 700, 721, 736, 765 and 786; Canron Limited, Eastern, Eastern Structural Division and The Draftsmen Association of Ontario, Local 164, Federation of Professional and Technical Engineers (A.F.L.-C.I.O.); and The Ontario Erectors Association and International Union of Operating Engineers, Hoisting Division, Local 793." (301 employees in the unit).

Number of names of persons on list as originally prepared by employer	296
Number of persons who cast ballots	269
Number of ballots marked in favour of applicant	140
Number of ballots marked in favour of Canadian Workers Union	125

0114-77-R: The Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Peel (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Sheridan Villa, save and except supervisors, persons above the rank of supervisor, professional medical and nursing staff, chef, office staff, students employed for the school vacation period and persons regularly employed for not more than twenty-four hours per week." (149 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	129
Number of persons who cast ballots	112
Ballots segregated and not counted	6
Number of ballots marked in favour of applicant	61
Number of ballots marked against applicant	45

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

2146-76-R: Labourers' International Union of North America, Local 837 (Applicant) v. Cooper Construction Company Limited (Respondent) v. Operative Plasterers' and Cement Masons' International Association, Local 298 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Intervener #2). (1 employees).

2184-76-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Symcon Building Limited (Respondent) v. Employees (Objectors).

- and -

2185-76-R: Labourers' International Union of North America, (Applicant) v. Symcon Building Company (Respondent) v. Employees (Objectors). (8 employees).

0280-77-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Western Dispatch Inc. operating as Western Dispatch Company (Respondent) v. Group of Employees (Objectors). (37 employees).

0411-77-R: Canadian Chemical Workers Union (Applicant) v. Hartz Mountain Pet Supplies Limited and Gold Fish Supply Company Limited (Respondents) v. Group of Employees (Objectors). (no employees).

0514-77-R: United Steelworkers of America (Applicant) v. Nairn Construction (Respondent). (32 employees).

0541-77-R: Lake Ontario District Council on behalf of Locals 397, 572, 1071, 1450 of The United Brotherhood of Carpenters and Joiners of America (Applicant) v. Johnson Drywall & Acoustics (Respondent). (6 employees).

0571-77-R: International Union of Operating Engineers Local 793 (Applicant) v. Beaver Seaway Limited (Respondent). (4 employees).

0578-77-R: International Association of Machinists and Aerospace Workers (Applicant) v. CAE Fiberglass Products Ltd. (Respondent).

Unit: "all employees of the respondent employed in the City of Guelph, Ontario, save and except formen, persons above the rank of foreman, office and sales staff." (27 employees in the unit).

Certification Dismissed Subsequent to Pre-Hearing Vote

0349-77-R: Boot and Shoe Worker's Union affiliated with the Canadian Labour Congress AFL-CIO (Applicant) v. Genesco of Canada Co. Ltd. (Respondent).

Voting Constituency: "All employees of the respondent at Cambridge save and except Foremen, Foreladies, persons above the rank of foreman and forelady, office staff and clerical employees, designers, sales staff, students employed during the school vacation period and persons employed less than 24 hours per week." (194 employees).

Number of names of persons on revised voters' list	180
Number of persons who cast ballots	178
Ballots segregated and not Counted	5
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	139

Certification Dismissed Subsequent to Post-Hearing Vote

1311-76-R: Hotel & Restaurant Employees and Bartenders International Union Local 412 (Applicant) v. J J's Restaurants Limited, carrying on business as Water Tower Inn (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Water Tower Inn at Sault Ste. Marie, save and except Manager, Assistant Manager and all persons above the rank of Manager and assistant Manager." (98 employees in the unit).

Number of names of persons on revised voters' list	79
Number of persons who cast ballots	70
Ballots segregated and not counted	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	36

2001-76-R: International Union of Operating Engineers, Local 793 (Applicant) v. Arthur G. McKee and Company of Canada Limited (Respondent) v. Labourers' International Union of North America, Local 837 (Intervener).

Unit: "all employees of the respondent working in the Regional Municipality of Niagara and the County of Haldimand as instrumentmen, rodmen, chainmen and party chief, save and except field engineers and persons above the rank of field engineers." (23 employees in the unit).

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	23
Ballots segregated and not counted	3
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	12

2204-76-R: Teamsters Union Local 938, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Alex Henry & Son Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the Respondent working at or out of Metropolitan Toronto, save and except foremen, those above the rank of foreman, dispatchers, office and sales staff, and those working less than 24 hours per week." (45 employees in the unit).

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	28
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	21

0072-77-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicant) v. Alex's Plumbing and Heating Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all plumbers, steamfitters, pipe welders, pipefitters, gasfitters, journeymen and apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	7

0209-77-R: Service Employees Union, Local 204 (Applicant) v. Bernesdale Residence, St. Catharines Assn. for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its Barnesdale Residence in St. Catharines, Ontario regularly employed for not more than twenty-four (24) hours per week and student employed during the school vacation period, save and except professional medical staff, supervisors, persons above the rank of supervisor and office staff." (11 employees in the unit).

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	7
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	3

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0396-76-R: Wheels Canadian Union (Applicant) v. Kelsey-Hayes Canada Limited (Respondent). (00 employees).

0400-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Teskey Construction Company Limited (Respondent). (78 employees).

0504-77-R: Labourers' International Union of North America, Local 607 (Applicant) v. Ellis-Don Ltd. (Respondent). (7 employees).

0514-77-R: United Steelworkers of America (Applicant) v. Nairn Construction Ltd. (Respondent). (32 employees).

0516-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. George Wimpey Canada Ltd. (Respondent). (6 employees).

0530-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. F. W. Sawatzky Limited (Respondent). (4 employees).

0591-77-R: Toronto Photo Engravers' Union Local 35-P Graphic Arts International Union (Applicant) v. Batten Cylinders Ltd. (Respondent) (5 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2021-76-R: Nicholas Robinson (Applicant) v. International Brotherhood of Electrical Workers, Local Union 353 (Respondent) v. J.A.K. Electrical Contractors Limited (Intervener). (*Granted*).

Unit: "all electricians and electricians' apprentices in the employ of J.A.K. Electrical Contractors Limited in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	10
Number of ballots marked in favour of Respondent	1
Number of ballots marked against Respondent	9

0364-77-R: Lloyd Lockyer James Gray (Applicants) v. I.B.E.W. Local 773 (Respondent). (2 employees). (*Terminated*).

0440-77-R: Bert Tolhoek (Applicant) v. International Union of Elevator Constructors, Local 90 (Respondent) v. Penn Elevator Limited (Intervener). (17 employees). (*Dismissed*).

0441-77-R: Murray Roberts (Applicant) v. International Union of Elevator Constructors, Local 50 (Respondent) v. Penn Elevator Limited (Intervener). (4 employees). (*Dismissed*).

0481-77-R: Memorial Marble & Tile Company Limited (Applicant) v. The United Brotherhood of Carpenters & Joiners of America, Local Union # 1669 (Respondent). (*Granted*).

Unit: "all employees of [the applicant] employed as tile setters in the District of Kenora, including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman." (no employees in the unit).

0537-77-R: Texaco Canada Limited (Applicant) v. United Steelworkers of America (Respondent). (10 employees). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

0488-77-R: Local Union 636, International Brotherhood of Electrical Workers (Applicant) v. The Public Utilities Commission of Fergus (Respondent). (*Granted*).

0489-77-R: Local Union 636 International Brotherhood of Electrical Workers (Applicant) v. The Board of Light & Heat Commissioners of the City of Guelph (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1978-76-M: Ontario Public Service Employees Union (Applicant) v. Humber College of Applied Arts and Technology (Respondent). (*Granted*).

0503-77-U: C & C Yachts Manufacturing Limited (Applicant) v. Carpenters Local Union 2737, Arthur Varty, Zigmunt Soyka, Peter Clark, Albert Bending, Gary Page, Brian Chesham, Fred Koidl, Fred Hopper, Edward Guay, and Albert Wiens (Respondents). (*Granted*).

0553-77-U: Ellis-Don Limited (Applicant) v. Labourers' International Union Local 1059 (Respondent). (*Withdrawn*).

0649-77-R: Holmes Foundry Limited (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 456 and Gordon Caudle and The Respondents Listed on Schedule "A" & "B" (Respondents). (*Direction*).

0675-77-U: Bechtel Canada Ltd. (Applicant) v. Mooretown Insulation Contractors Ltd., Eaman-Riggs Limited, K. J. Armstrong, George Anderson Jr., James E. Cable, Leonard Caul, Vincent R. Caul, Christopher D. Clarke, Cecil Vanderveen, Harvey L. Williams, John Ainsworth, Keith Ainsworth, Peter Ainsworth, Steven Ainsworth, Eugene Bowman, Angus Burnett, Eugene Cassibo, Aubin Chiasson, Gerald Chipman, Dave Clements, John Cutler, Leslie Cutler, Gerry Dagenais, John Edgar, Rick Foster, Joseph Giardino, Robert Gilchrist, Edward Hamilton, Mark Heartwell, Robert Hughes, Duncan Jaffray, John Keller, Joseph Lesko, Ian Lightfoot, Howard Mallette, Joseph Matthews, Joseph Miller, Orval Mindle, Steve McCartney, Mike McGhee, Ken MacLeod, Robert MacLeod, Adrian Nearing, Greg Nearing, David Newell, Bert Pasternak, George Pickstock, Helier Richard, Marc Richard, Robert Shepherd, Jim Sizer, John Sizer, Frank Smith, Winston Smith, Ronald Thompson, Greg Twinn, William Valquette, Dennis Van Der Veeken, William Van Hoof, and George Yetman (Respondents). (*Granted*).

0682-77-U: Eaman-Riggs Limited; and The Master Insulators' Association of Ontario, Incorporated (Applicants) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95; Dave Clements, Ken MacLeod, Angus Burnett, Mike McGhee, John Cutler, Gerry Dagenais, Rick Foster, Edward Hamilton, Joseph Lesko, Howard Mallette, Joseph Miller, Robert Shepherd, Jim Sizer, Frank Smith, Joseph Matthews, Eugene Bowman, Eugene Cassibo, Leslie Cutler, Joseph Giardino, Robert Gilchrist, Orval Mindle, Greg Twinn, John Ainsworth, John Edgar, Steve McCartney, Adrian Nearing, Greg Nearing, David Newell, Bert Pasternak, George Pickstock, John Sizer, William Van Hoof, George Yetman, John Keller, Robert MacLeod, William Valquette, Keith Ainsworth, Helier Richard, Peter Ainsworth, Ian Lightfoot, Aubin Chiasson, Gerald Chipman, Mark Heartwell, Duncan Jaffray, Winston Smith, Dennis Van der Veeken, Marc Richard, Steven Ainsworth, Ronald Thompson, and Robert Hughes (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0216-77-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC and Retail, Wholesale and Department Store Union, Local 461 (Applicant) v. Humpty Dumpty Foods Limited (Respondent). (*Granted*).

0557-77-U: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. JIMMY'Z, formerly known as RED LION PUBLIC INN (Respondent). (*Withdrawn*).

0564-77-U: International Beverage Dispensers' & Bartenders Union, Local 280 of the Hotel & Restaurant Employees' and Bartenders' International Union, AFL, CIO, CLC (Applicants) v. JIMMY'Z, formerly known as the Red Lion Inn (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0244-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. Greenwin Property Management, Len Dye and James Long (Respondents). (*Withdrawn*).

0532-77-U: United Garment Workers of America and its Local 253 (Applicant) v. Outdoor Outfits Limited and Abbey Crest Limited (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0951-75-U: Edward Taubert (Complainant) v. Canron Ltd., Eastern Structural Division (Respondent) v. Canadian Workers Union (Intervener). (*Dismissed*).

1665-76-U: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the Borough of Etobicoke (Respondent) v. Federation of Women Teachers' Associations of Ontario, Women Teachers' Association of Etobicoke, Ontario Secondary School Teachers Federation, and District 12, Ontario Secondary School Teachers Federation (Interveners). (*Dismissed*).

1668-76-U: Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital (Respondent).
- and -

1706-76-U: Ontario Nurses' Association (Complainant) v. St. Joseph's Hospital (Respondent). (*Dismissed*).

1710-76-U: Service Employees Union, Local 204 (Complainant) v. Summit Park Lodge (Respondent). (*Terminated*).

1759-76-U: Frank Howell-Harries (Complainant) v. International Chemical Workers Union (Respondent #1) v. Canadian International Paper Company (Respondent #2). (*Dismissed*).

2090-76-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Dovercourt Tavern Limited known as the Oakwood Hotel (Respondent). (*Granted*).

0097-77-U: Retail Clerks Union, Local 206 (Complainant) v. V. S. Services Limited (Respondent). (*Terminated*).

0226-77-U: Norman Walker (Complainant) v. United Automobile, Aerospace & Agriculture Implement Workers of America, U.A.W. Local 439 (Respondent). (*Dismissed*).

0281-77-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. N-J Spivak Limited (Respondent). (*Dismissed*).

0322-77-U: James Emanuel Henry (Complainant) v. Toronto Joint Board Amalgamated Clothing and Textile Workers Union and Del-Mar Clothes Ltd. (Respondents). (*Dismissed*).

0328-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employee's and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. Dovercourt Tavern Limited known as the Oakwood Hotel (Respondent). (*Granted*).

0377-77-U: United Steelworkers of America on behalf of Local 13704 (Complainant) v. Shaw-Almex Industries Limited (Respondent). (*Withdrawn*).

0413-77-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Complainant) v. St. Michael's Shops of Canada Limited (Operating as Marks and Spencer) (Respondent). (*Withdrawn*).

0422-77-R: Henry Gadawski (Complainant) v. The Great Atlantic and Pacific Co. of Canada Ltd., and Canadian Food and Allied Workers (Respondent). (*Withdrawn*).

0424-77-U: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Nel-Gor Castle Nursing Home (Respondent). (*Withdrawn*).

0426-77-U: United Cement Workers of America (Complainant) v. Abbey Crest Ltd. (Respondent). (*Withdrawn*).

0438-77-U: Mr. Clinton Reid (Complainant) v. Labour Bureau of the Ontario Road Builders Association and the Ontario Sewer and Watermain Contractors Association, 325 Eddy Stone St., Toronto, and T.E.L., Council of Trade Unions 205 Church St., Toronto, and Capital Paving Limited (Respondents). (*Withdrawn*).

0449-77-U: Ontario Nurses' Association (Complainant) v. The Downtown Convalescent Centre (Respondent). (*Withdrawn*).

0473-77-U: James Patrick O'Hearne (Complainant) v. Steelworkers of America (Respondent). (*Withdrawn*).

0491-77-U: Local 280 of the International Beverage Dispensers and Bartenders Union of the Hotel & Restaurant Employees and Bartenders International Union, AFL, CIO, CLC (Complainant) v. Richmond Inn Limited, known as Richmond Inn Motor Hotel (Respondent). (*Withdrawn*).

0492-77-U: Pamela Smith (Complainant) v. Levi-Strauss of Canada Ltd. and the Amalgamated Clothing & Textile Workers of America (Respondents). (*Dismissed*).

0509-77-U: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Coinamatic (Eastern) Ltd. (Respondent). (*Withdrawn*).

0522-77-U: United Cement, Lime and Gypsum Workers International Union (Complainant) v. Francheschi Brothers Construction Ltd. (Respondent). (*Dismissed*).

0545-77-U: Canadian Union of Public Employees (Complainant) v. Groves Park Lodge (Respondent). (*Withdrawn*).

0561-77-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Newcor Canada Limited (Respondent). (*Withdrawn*).

0582-77-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Newcor Canada Limited (Respondent). (*Withdrawn*).

0589-77-U: United Steelworkers of America (Complainant) v. Alumicor Manufacturing Limited (Respondent). (*Withdrawn*).

0595-77-U: Diane Brdar (Complainant) v. Canadian Union of Public Employees, Local 1222 (Respondent). (*Withdrawn*).

0604-77-U: Canadian Union of Public Employees (Complainant) v. Medi Park Lodges, Inc. (Respondent). (*Withdrawn*).

0605-77-U: Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Association (Complainant) v. Bittners Meat & Delicatessen Market (Respondent). (*Withdrawn*).

0610-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union - A.F.L.-C.I.O.-C.L.C. (Complainant) v. Boulevard Inn (Respondent). (*Withdrawn*).

APPLICATION FOR DETERMINATION UNDER SECTION 95(2)

2020-76-M: Canadian Union of Public Employees, Local 207 (Applicant) v. The Regional Municipality of Sudbury (Respondent). (*Granted*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

1269-76-M: Super-X Drugs Limited (Employer) v. Retail Clerks International Association (Trade Union) v. Morden B. Niren and Ardon Pharmacy Limited (Parties Added by the Board).

0456-77-M: Peel Memorial Hospital (Employer) v. Canadian Union of Operating Engineers, Local 101 (Trade Union).

0525-77-M: Aldershot Contractors Equipment Rental Limited (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112A

0706-76-M: United Brotherhood of Carpenters & Joiners of America, Local Union #38 (Applicant) v. Dickie Construction Company Ltd. (Respondent). (*Granted*).

0009-77-M: Ainsworth Electric Co. Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 353 (Respondent) v. Electrical Contractors Association of Toronto (Intervener). (*Dismissed*).

0394-77-M: Labourers' International Union of North America (Applicant) v. Val-Ros Construction Ltd. (Respondent). (*Granted*).

0452-77-M: The Sheet Metal Workers' International Association, Local Union #562 (Applicant) v. The Waterloo-Wellington Sheet Metal Contractors' Association, Nelco (Kitchener) Ltd., Hutchison Mechanical Installations Ltd., Hebel Sheet Metal Ltd. and Sutherland-Schultz Limited (Respondents). (*Withdrawn*).

0508-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Crane Rental Association of Ontario and its Affiliate Arlington Crane Service (Respondent). (*Withdrawn*).

0511-77-M: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Belanger Construction Limited (Respondent). (*Withdrawn*).

0542-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. Life Construction Limited (Respondent). (*Withdrawn*).

0543-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. Petrisan Construction (Ontario) Limited (Respondent). (*Withdrawn*).

0551-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Metropolitan Toronto Road Builders Association and its Affiliate John Cucci Limited (Respondents). (*Withdrawn*).

0560-77-M: A Council of Trade Unions acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America Local 183 (Applicant) v. The Metropolitan Toronto Road Builders' Association and Prospect Paving Limited (Respondents). (*Withdrawn*).

0607-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. K-Forma Engineering Limited (Respondent). (*Withdrawn*).

0612-77-M: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. Grand Valley Construction Association and H.G. Susgin Carpentry and H.G. Susgin Construction Limited (Respondents). (*Granted*).

0613-77-M: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Ponti Group Masonry Ltd. (Respondent). (*Granted*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1500-76-R: Amalgamated Clothing and Textile Workers Union Toronto Joint Board (Applicant) v. Dylex Limited (Respondent) v. Group of Employees (Objectors). (*Request Denied*).

0040-77-R: Ontario Nurses' Association (Applicant) v. The Greater Niagara General Hospital (Respondent). (*Request Denied*).

0302-77-M: Sunnybrook Medical Centre (Employer) v. Sunnybrook Hospital Employees' Union Local 777 (Trade Union) v. Stan Babad (Employee/Applicant). (*Section 96*). (*Request Denied*).

ONTARIO LABOUR RELATIONS BOARD

Monthly Case Breakdown—Disposition and Comparison July 1977

Case Type	Applications Received		Total Disposed of			Disposed of During: July			Disposed of Last Month			
	During: July	Last Month	During: July	Last Month	Granted	Dismissed	Withdrawn	Pending	Granted	Dismissed	Withdrawn	Pending
Certification	73	90	71	93	53	12	6	204	64	12	17	202
Termination	1	9	7	11	1	3	3	9	8	3	—	15
Section 1(4)	—	2	1	—	—	1	—	9	—	—	—	10
*Successor Status	1	5	1	1	1	—	—	17	—	—	1	17
Accreditation	—	—	—	—	—	—	—	7	—	—	—	7
Unlawful Strike	2	1	—	2	—	—	—	32	1	—	1	30
Unlawful Lockout	1	1	2	—	—	—	2	1	—	—	—	2
Prosecutions	9	6	2	7	—	—	2	119	—	—	7	112
Section 79	40	33	32	28	2	11	19	186	6	4	18	178
**Declaration of Unlawful Strike or Lockout	13	6	4	4	3	—	1	72	—	—	4	63
***Misc.	25	32	15	17	6	1	8	200	—	2	15	190
Bill 139	—	1	—	1	—	—	—	—	—	—	1	—
TOTAL	165	186	135	164	66	28	41	856	79	21	64	826

NOTE: The Pending figures found directly beside the section "Disposed of During: _____" are a consolidation of those cases received during the month and pending into the next, and the pending cases from the previous month.

*Sections 54 and 55 are consolidated.

**Sections 123, 82, 83 and 63 are consolidated.

***Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) are consolidated.

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1977-1978
ONTARIO LABOUR RELATIONS BOARD**

April 1st, 1977 to June 30th, 1977

- Table 1. Applications and Complaints Filed with the Ontario Labour Relations Board.
- Table 2. Hearings of the Ontario Labour Relations Board.
- Table 3. Applications and Complaints Disposed of by the Ontario Labour Relations Board, listed by Major Types.
- Table 4. Applications Disposed of by the Ontario Labour Relations Board, by Type and Disposition.
- Table 5. Representation Votes in Certification Applications Disposed of by the Ontario Labour Relations Board.
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- Table 7. Time Lapse of Certification Applications Disposed of by the Ontario Labour Relations Board.
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- Table 10. Time Lapse of All Cases Disposed of by the Ontario Labour Relations Board.

TABLE 1

**APPLICATIONS AND COMPLAINTS FILED
WITH THE ONTARIO LABOUR RELATIONS BOARD**

	Number Filed	
	1st Quarter 1977 April - June	1st Quarter 1976 April - June
1. Certification	276	290
2. Declaration of Termination of Bargaining Rights	24	21
3. Declaration of Successor Trade Union or Employer	4	NS
4. Declaration of Common Employer Status	10	8*
5. Accreditation of Employer Organization	—	NS**
6. Declaration of Unlawful Strike	2	45
7. Declaration of Unlawful Lock-Out	2	1
8. Direction Respecting Unlawful Strike or Lock-Out	26	NS***
9. Consent to Prosecute	26	42
10. Complaints Respecting a Contravention of the Act (Section 79)	112	147
11. Miscellaneous	81	94****
12. Bill 139 – Employees Health and Safety Act	1	—
Total	564	648

*The figure for the 1st Quarter of 1976 was Not Stated in the 'Decisions' Book for July, 1976, for the section of Declaration of Successor Trade Union or Employer. It was consolidated with the figure for the section Declaration of Common Employer Status.

**The figure for the 1st Quarter of 1976 was Not Stated in the 'Decisions' Book for July, 1976.

***The figure for the 1st Quarter of 1976 was Not Stated in the 'Decisions' Book for July, 1976. The figure representing the 1st Quarter for 1977 is a consolidation of the following sections of the Act:

- | | |
|----------------|---------------|
| a) Section 123 | c) Section 83 |
| b) Section 82 | d) Section 63 |

****Miscellaneous is comprised of the following sections of the Act:

- | | |
|------------------|-------------------|
| a) Section 37 | e) Section 81 |
| b) Section 39 | f) Section 95(2) |
| c) Section 44(3) | g) Section 96 |
| d) Section 76 | g) Section 112(a) |

NOTE: The figure for the 1st Quarter of 1976 for Bill 139 is not presented as the Bill came into effect in January of 1977.

TABLE 2**HEARINGS OF THE ONTARIO LABOUR RELATIONS BOARD**

	Number Filed	
	1st Quarter 1977	1st Quarter 1976
	<u>April – June</u>	<u>April – June</u>
Hearings and Continuations of Hearings by the Board	364	372

TABLE 3**APPLICATIONS AND COMPLAINTS DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD,
LISTED BY MAJOR TYPES**

	Number Disposed of	
	1st Quarter 1977	1st Quarter 1976
	<u>April – June</u>	<u>April – June</u>
Certification	260	279
Declaration of Termination of Bargaining Rights	28	16
Declaration of Successor Trade Union or Employer	22	NS*
Declaration of Common Employer Status	–	3
Accreditation of Employer Organization	1	NS**
Declaration of Unlawful Strike	2	21
Declaration of Unlawful Lock-Out	–	1
Direction Respecting Unlawful Strike or Lock-Out	21	NS***
Consent to Prosecute	12	17
Complaints Respecting a Contravention of the Act (Section 79 of the OLRA)	87	92
Miscellaneous	50	68
Bill 139 – Employees Health and Safety Act	1	–
Total	<u><u>484</u></u>	<u><u>497</u></u>

*The figure for the 1st Quarter of 1976 is indicated Not Stated as nothing was reported for this section in the quarterly report July, 1976.

**The figure for the 1st Quarter of 1976 was Not Stated in the 'Decisions' Book for July, 1976.

***The figure for the 1st Quarter of 1976 was Not Stated in the 'Decisions' Book for July, 1976.

TABLE 4
**APPLICATIONS DISPOSED OF BY THE ONTARIO
LABOUR RELATIONS BOARD BY TYPE AND DISPOSITION**

	Number of Applications		Number of Employees*	
	1st Quarter April - June <u>1977</u>	1st Quarter April - June <u>1976</u>	1st Quarter April - June <u>1977</u>	1st Quarter April - June <u>1976</u>
CERTIFICATION				
Granted	183	206	6727	6841
Dismissed	35	43	1245	1432
Withdrawn	42	30	632	473
Total	<u>260</u>	<u>279</u>	<u>8604</u>	<u>8746</u>
TERMINATION OF BARGAINING RIGHTS				
Granted	18	5	807	77
Dismissed	6	8	40	67
Withdrawn	4	3	25	36
Total	<u>28</u>	<u>16</u>	<u>872</u>	<u>180</u>
SUCCESSOR STATUS				
Granted	18			
Dismissed	1			
Withdrawn	3			
Total	<u>22</u>			
			Information Not Stated for 1976	
COMMON EMPLOYER STATUS			3	Disposition Breakdown NS for 1976
Granted	-			
Dismissed	-			
Withdrawn	-			
Total	<u>-</u>			
ACCREDITATION				
Granted	-			
Dismissed	-			
Withdrawn	1			
Total	<u>1</u>			
			Information Not Stated for 1976	
UNLAWFUL STRIKE				
Granted	1	7		
Dismissed	1	3		
Withdrawn	1	11		
Total	<u>2</u>	<u>21</u>		
UNLAWFUL LOCK-OUT				
Granted	-	1		
Dismissed	-	-		
Withdrawn	-	-		
Total	<u>-</u>	<u>1</u>		

TABLE 4 (Cont.)
**APPLICATIONS DISPOSED OF BY THE ONTARIO
LABOUR RELATIONS BOARD BY TYPE AND DISPOSITION**

	Number of Applications		Number of Employees*	
	1st Quarter	1st Quarter	1st Quarter	1st Quarter
	April - June	April - June	April - June	April - June
	<u>1977</u>	<u>1976</u>	<u>1977</u>	<u>1976</u>
DIRECTION RESPECTING UNLAWFUL STRIKE OR LOCK-OUT				
Granted	1			
Dismissed	5			
Withdrawn	15			
Total	<u>21</u>			
			Information Not Stated for 1976	
CONSENT TO PROSECUTE				
Granted	1		1	
Dismissed	-		4	
Withdrawn	11		12	
Total	<u>12</u>		<u>17</u>	
COMPLAINTS UNDER SECTION 79	79			
Granted	10		11	
Dismissed	12		19	
Withdrawn	65		62	
Total	<u>87</u>		<u>92</u>	
MISCELLANEOUS				
Granted	9			
Dismissed	7			
Withdrawn	34			
Total	<u>50</u>		<u>68</u>	
			Disposition Breakdown NS for 1976	
BILL 139 (EHSA)				
Granted	-			
Dismissed	-			
Withdrawn	1			
Total	<u>1</u>			
TOTAL	<u>484</u>	<u>497</u>	<u>9476</u>	
8926				

*These figures refer to the number of employees directly affected and are based on the number of employees in the bargaining units at the time that the applications for certification and termination were filed with the Board.

TABLE 5

**REPRESENTATION VOTES IN CERTIFICATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes	
	1st Quarter 1977 <u>April - June</u>	1st Quarter 1976 <u>April - June</u>
CERTIFICATION AFTER VOTE*		
Pre-Hearing Vote	18	15
Post-Hearing Vote	8	7
Ballots Not Counted	-	-
DISMISSED AFTER VOTE		
Pre-Hearing Vote	6	8
Post-Hearing Vote	7	7
Ballots Not Counted	-	1
TOTAL	<u>39</u>	<u>38</u>

*Includes applicant-intervener applications in which both applicant and intervener apply for a new unit and either applicant or intervener is certified.

TABLE 6

**REPRESENTATION VOTES IN TERMINATION APPLICATIONS
DISPOSED OF
BY THE ONTARIO LABOUR RELATIONS BOARD**

	Number of Votes	
	1st Quarter 1977 <u>April - June</u>	1st Quarter 1976 <u>April - June</u>
Respondent Union Successful*	-	-
Respondent Union Unsuccessful	14	4
TOTAL	<u>14</u>	<u>4</u>

*In Termination Proceedings, where a vote is taken, the applicant is a group of employees or the employer; the incumbent Union is thus the Respondent.

TABLE 7

**TIME LAPSE OF CERTIFICATION APPLICATIONS
DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD,
1st QUARTER 1977**

	Time Taken in Calendar Days		
	Total	Number	Total
		Per Cent	Cumulative Per Cent
Total	260	100.0	-
Under 8 days	<u><u>7</u></u>	<u><u>2.7</u></u>	<u><u>2.7</u></u>
8-14	46	17.7	20.4
15-21	68	26.2	46.6
22-28	42	16.2	62.8
29-35	10	3.8	66.6
36-42	18	6.9	73.5
43-49	17	6.5	80.0
50-56	9	3.5	83.5
57-63	3	1.2	84.7
64-70	4	1.5	86.2
71-77	4	1.5	87.7
78-84	4	1.5	89.2
85-91	4	1.5	90.7
92-98	2	0.8	91.5
99-105	4	1.5	93.0
106-126	3	1.2	94.2
127-147	1	0.4	94.6
148-168	1	0.4	95.0
169 days and Over	13	5.0	100.0

TABLE 8

**TIME LAPSE OF SECTION 79 COMPLAINTS DISPOSED OF BY
THE ONTARIO LABOUR RELATIONS BOARD, 1st QUARTER 1977**

Time Taken in Calendar Days	Total		
	Number	Per Cent	Cumulative Per Cent
Total	87	100.0	-
Under 8 days	2	2.3	2.3
8-14	7	8.0	10.3
15-21	22	25.3	35.6
22-28	18	20.7	56.3
29-35	4	4.6	60.9
36-42	1	1.1	62.0
43-49	7	3.5	65.5
50-56	3	3.5	69.0
57-63	6	6.9	75.9
64-70	2	2.3	78.2
71-77	3	3.5	81.7
78-84	2	2.3	84.0
85-91	0	0.0	
92-98	2	2.3	86.3
99-105	0	0.0	
106-126	1	1.1	87.4
127-147	0	0.0	
148-168	5	5.7	93.1
169 days and Over	6	6.9	100.0

TABLE 9
**TIME LAPSE OF SECTION 112(a) COMPLAINTS DISPOSED OF BY
THE ONTARIO LABOUR RELATIONS BOARD, 1st QUARTER 1977**

<u>Time Taken in Calendar Days</u>		<u>Total</u>	
	<u>Number</u>	<u>Per Cent</u>	<u>Cumulative Per Cent</u>
Total	<u>40</u>	<u>100.0</u>	<u>-</u>
Under 8 days	<u>0</u>	<u>0.0</u>	<u>0.0</u>
8-14	15	37.5	37.5
15-21	2	5.0	42.5
22-28	3	7.5	50.0
29-35	6	15.0	65.0
36-42	1	2.5	67.5
43-49	2	5.0	72.5
50-56	2	5.0	77.5
57-63	1	2.5	80.0
64-70	1	2.5	82.5
71-77	1	2.5	85.0
78-84	2	5.0	90.0
85-91	0	0.0	
92-98	0	0.0	
99-105	1	2.5	92.5
106-126	1	2.5	95.0
127-147	0	0.0	
148-168	1	2.5	97.5
169 days and Over	1	2.5	100.0

TABLE 10

**TIME LAPSE OF ALL CASES DISPOSED OF BY
THE ONTARIO LABOUR RELATIONS BOARD, 1st QUARTER 1977**

Time Taken in Calendar Days	Total		
	Number	Per Cent	Cumulative Per Cent
Total	484	100.0	—
Under 8 days	19	3.9	3.9
8-14	77	15.9	19.8
15-21	112	23.1	42.9
22-28	80	16.5	59.4
29-35	29	6.0	65.4
36-42	23	4.8	70.2
43-49	27	5.6	75.8
50-56	16	3.3	79.1
57-63	11	2.3	81.4
64-70	9	1.9	83.3
71-77	13	2.7	86.0
78-84	12	2.5	88.5
85-91	8	1.7	90.2
92-98	4	0.8	91.0
99-105	5	1.0	92.0
106-126	5	1.0	93.0
127-147	2	0.4	93.4
148-168	7	1.4	94.8
169 days and Over	25	5.2	100.0



Labour
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ONTARIO LABOUR RELATIONS BOARD

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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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Trade Union Status – *Certification* – Whether employee organization has established status – Importance of Board finding of status discussed.

ONTARIO HAULERS UNION v. REPAC CONSTRUCTION & MATERIALS LIMITED v. A COUNCIL OF TRADE UNIONS ACTING AS THE REPRESENTATIVE AND AGENT OF TEAMSTERS' LOCAL UNION 230 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION 183 v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL UNION 230 v. LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION 183 v. THE METROPOLITAN TORONTO ROAD BUILDERS' ASSOCIATION

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2081-76-U, 0041-77-U, 0048-77-U The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers, Union #60, (Complainants), v. **The Journal Publishing Company of Ottawa Limited** and L.A. Lalonde, (Respondents); **The Journal Publishing Company of Ottawa Limited**, (Complainant), v. The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60, (Respondents).

Reconsideration – Duty to Bargain in Good Faith – Whether Board should reconsider earlier decision in light of subsequent events. – Whether Board should vary remedy previously granted.

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and M.J. Fenwick.

APPEARANCES: *J. Sack and R. Rae for the Ottawa Council of Newspaper Unions; H.A. Beresford, C. Morley and L.A. LaLonde for The Journal Publishing Company of Ottawa Limited.*

DECISION OF THE BOARD: September 19, 1977.

1. This is a determination as to whether the Board should reconsider an earlier decision in these matters in the light of events occurring subsequent to that decision.

2. The Board's earlier decision found that the longstanding collective bargaining dispute between The Ottawa Newspaper Guild, Local 205, The Ottawa Typographical Union, Local 102, The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, The Ottawa Mailers' Union #60 ("the unions") and The Journal Publishing Company of Ottawa Limited ("The Journal") had been marked by certain instances of bad faith bargaining. The Board, after reviewing the entire course of the negotiations, from June 1976 until mid-April 1977, concluded that the responsibility for the breakdown of negotiations had to be borne by both sides. In these circumstances, the Board directed both sides to meet with a mediator, and to bargain in good faith and make every reasonable effort to conclude a collective agreement.

3. The thrust of the unions' argument in support of reconsideration was that certain facts arising after this decision justified a re-examination of this matter by the Board. Counsel for the unions characterized the application for reconsideration as being, in essence, an application to vary the remedy in light of subsequent events, and not as an appeal of the Board's earlier findings of fact. Given these circumstances, counsel submitted that the Board had a discretion to reconsider its earlier decision, citing as authority *R. v. Ontario Labour Relations Board, Ex p. Genaire Ltd.*, [1958] O.R. 637 (Ont. H.C.); aff. [1959] O.W.N. 149 (Ont. C.A.); *Bakery and Confectionery Workers International Union of America, Local 468 v. Salmi et al.*, [1966] S.C.R. 282; *Re Merens et al and Municipality of Metropolitan Toronto*, [1973] 2 O.R. 265 (Ont. Div. Ct.). Counsel further argued that the Board could not

fetter this discretion to reconsider by adopting a rigid, preconceived policy, foreclosing reconsideration, alluding to certain remarks of Reid J. in the recent decision of the Divisional Court in *Jordan et al* and *The Ontario Labour Relations Board, York University Faculty Association, York University and Osgoode Hall Faculty Association*. Finally, counsel argued that reconsideration in light of subsequent events was a natural concomitant of the Board's power to regulate the collective bargaining process. Collective bargaining, being a dynamic process, required that the remedial power be of a continuing nature, making appropriate the exercise of the power to reconsider in the light of subsequent events.

4. Weighing against these arguments were the submissions of The Journal's counsel, based largely upon the approach taken by the Board in earlier cases when determining whether it should reconsider in the light of newly discovered evidence and legal arguments. This line of cases, of which *Detroit River Construction Ltd.* (1962), 63 CLLC ¶16,260 is perhaps the leading authority, recognizes the need for finality in Board decisions by placing severe restrictions on the Board's power to reconsider. Counsel argued that these authorities, although not dealing with situations where reconsideration was sought on the basis of events occurring after the Board's decision, were equally relevant to the request now before us. The purpose of the Board's remedial function, according to counsel, was merely to determine the respective rights and obligations of the parties at any given point in time, in order that appropriate penalties might be meted out. Given this characterization of the Board's remedial function, it followed that reconsideration would amount to reception of evidence after the fact, interfering with the finality of the Board's determination.

5. The question, then, is whether the Board should proceed to reconsider a previous decision on the basis of facts arising subsequent to that decision. Our answer to this question must take into account aspects of both arguments presented to us. We recognize that, after the court's decision in *Genaire*, the Board cannot close its eyes to the existence of facts relevant to an earlier decision simply because these facts have arisen some time after that decision was made. This type of situation, moreover, differs from those before the Board in that line of cases, marked by *Detroit River Construction Ltd.*, *supra*, dealing with the availability of reconsideration on the basis of either, evidence newly discovered but in existence prior to the earlier hearing, or arguments that also might have been made at such earlier hearing. Here, it is events following the earlier hearing and decision that form the basis for the unions' request for reconsideration. The Board recognizes, therefore, that the guidelines set out in *Detroit River Construction Ltd.* may not be completely appropriate for the case at hand, and that some reassessment of these principles is clearly required.

6. This assessment, however, cannot ignore the underlying rationale for the guidelines – the need for some finality in the Board's decision-making process. As the Board stated in *Detroit River Construction Ltd.*:

“...While depending upon the circumstances of the case and the applicable principles of natural justice, the Board ought not to be as strict or as technical as a Court, it must nevertheless, in our view, recognize the necessity for and apply some principle of finality to its decision. It stands to reason that when a party has gone through the ordeal, expense and inconvenience of a hearing and obtained a decision in his favour, that he should not be deprived of the benefit of that decision except for good cause. The Board ought not to encourage a practice

whereby one party can remain silent throughout a hearing, and after he has discovered the weak points in his adversary's armour be permitted to exploit them by calling evidence at another and later hearing which he could and should have presented at the original hearing. If it were otherwise, the door would be open in any given case to ceaseless and never-ending hearings each serving as a prelude to the next *ad infinitum* and no one could ever safely rely on any decision as finally settling the rights of the parties."

These remarks indicate that finality is required for at least two reasons. The first reason is to protect the interests of those who have relied upon the Board's decision. The reliance interest is perhaps most important in those cases where the Board's decision has the effect of conferring or withdrawing bargaining rights. In such cases, where representation rights are in issue, the need for certainty and finality becomes obvious. A second reason, and perhaps no less important, is to protect the integrity of the Board's own processes. These processes must be protected from parties who, under the guise of reconsideration, are merely seeking to repair, or reargue, a lost case.

7. The case before us must be considered in light of these two concerns. The Board, in its earlier decision, dealt with the bargaining conduct of the unions and The Journal, and ordered what it considered to be the appropriate remedy. This remedy was influenced by the Board's general approach to problems of this nature, an approach that places emphasis, not upon the wrongfulness of the conduct of the parties, but upon the restoration of the collective bargaining relationship. This remedial exercise is not so much concerned with determining rights and obligations as with rectifying bad bargaining practices. The bargaining order made by the Board, in this case, therefore, did not create vested rights, but merely served to provide guidance for future actions. The concern that reconsiderations of this order may upset the legitimate expectation of at least one of the parties appears to be less justified in these circumstances. Reconsideration on the basis of subsequent events would not result in the imposition of some heavier penalty, but at most would alter the Board's approach toward improving the bargaining relationship.

8. The reduced significance of the reliance interest in a case such as this one, however, does not mean that the Board should entertain a request for reconsideration just because events have arisen after its decision. To adopt such an approach would permit every bargaining complaint to be reconsidered, providing a party with opportunity to either repair, or reargue, the case that it has already presented. In order to prevent such an abuse of process, a party seeking reconsideration of a bargaining order on the basis of events occurring after the Board's decision must establish convincingly that subsequent events have altered substantially the bargaining situation so as to make the Board's initial order clearly inappropriate. It should be made clear that the onus upon the party seeking reconsideration in these circumstances is not a light one. Once the Board has carefully reviewed a bargaining situation and issued a remedy, the Board must be convinced that there has been a substantial alteration in the pattern of conduct that it has already reviewed before it will reinser itself into the negotiations.

9. The Board is now prepared to hear evidence of events occurring after its decision in order to determine whether there has been a substantial alteration of the bargaining situation that makes the Board's initial remedial order clearly inappropriate. The hearing will continue at a date to be set by the Registrar.

1374-76-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (Applicant), v. **Indusmin Limited**, (Respondent).

Certification – Employee – Whether subject group of truck drivers are dependent contractors – Effect of federal combines legislation.

BEFORE: D.H. Kates, Vice-Chairman and Board Members H. Simon and F.W. Murray

APPEARANCES: E.G. Posen and John McNamee for the applicant; N. MacL. Rogers, Q.C. and Martin Schisizzi for the respondent.

DECISION OF D.H. KATES, VICE-CHAIRMAN AND BOARD MEMBER H. SIMON: September 1, 1977.

1. This is an application for certification for a group of truck drivers retained by the respondent to perform haulage services. At issue is the employment status of these drivers for purposes of the Act. The respondent argues that they are independent contractors within "the fourfold test" established at law. The applicant maintains, notwithstanding the respondent's assertion, that the drivers are "dependent contractors" and as such ought to be treated as employees entitled to collective bargaining. The relevant provisions of the Act read as follows:

"Section 1 – (1) In this Act,

(ga) "dependent contractor" means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(gb) "employee" includes a dependent contractor;

S. 6.-.(4) A bargaining unit consisting solely of dependent contractors shall be deemed by the Board to be a unit of employees appropriate for collective bargaining but the Board may include dependent contractors in a bargaining unit with other employees if the Board is satisfied that a majority of such dependent contractors wish to be included in such bargaining unit.

2. The respondent, in addition to its submissions on the employment status of the truck drivers, raised the issue of the Board's constitutional jurisdiction to grant the applicant bargaining rights on behalf of "employees" who may be concluded to be dependent contractors. The respondent's argument is summarized in its letter to the Board dated May 26, 1977:

"...3. As there is a conflict between the provisions of The Labour Rela-

tions Act and the Combines Investigation Act in the sense that said section 1(1)(ga) purports to broaden the definition of "employee" to include that of a dependent contractor and only employees (as defined at common law) are exempt from the Combines Investigation Act which prohibits anyone from conspiring or agreeing with anyone else from preventing or to prevent or lessen unduly competition in the supply of a product (including services), the federal legislation must prevail. The respondent cannot be required to enter into negotiations which would have the effect of unduly lessening competition in the supply of trucking services to its customer. To that extent the amendment in The Labour Relations Act adding the definition of "dependent contractor" to that of "employee" is *ultra vires* the Ontario Legislature."

3. Whatever the merits of the respondent's argument the Board is of the opinion that we are without competence or expertise to deal with it. The Legislature, in introducing the "dependent contractor" provisions into *The Labour Relations Act* ought to be presumed to have conferred upon the Board the authority to deal with "employees" properly falling under the Legislative umbrella of Provincial jurisdiction. The Board's mandate is to apply and interpret the relevant provisions of *The Labour Relations Act*. Should the Act, or any of its provisions, allegedly conflict with the provisions of another statute falling outside Provincial jurisdiction any steps taken by this Board under those provisions may, in any event, be deemed without legal effect. The Board is of the view that the appropriate forum for litigating issues pertaining to the *ultra vires* nature of *The Labour Relations Act* is before the courts. Until the Board is in receipt of any decision, direction or emanation from the courts indicating the nullity of the Act, or any portion thereof, we intend to operate under the assumption that the impugned portions of *The Labour Relations Act* are properly conceived. Parenthetically, we might add that the "dependent contractor" provisions although recently introduced into The Ontario Labour Relations Act is not a concept that has not been applied in other Provincial jurisdictions. Indeed, the Federal *Canada Labour Code* (R.S.C. 1970, CL-I, S. 107 as amended) contains a like provision defining in appropriate circumstances the entitlement of "the dependent contractor" to rights under the statute. Should the existence of a conflict between the Federal *Combines Investigations Act* and the Provincial labour relations acts seriously be maintained, then the Board would urge that judicial clarification ought to be secured. It does not serve any party to the process to have a cloud pervade Legislation of such significant import. We might also add that nothing has been brought to our attention to indicate that the Federal authorities are particularly concerned about the impugned nature of concerted action by "dependent contractors" who seek the benefits of collective bargaining.

4. The respondent is engaged in the business of the production, sale and delivery of gravel stone, aggregate and like construction materials. For this purpose it owns and maintains a number of quarries, one of which is located at its Halton premises in Milton, Ontario. This particular application pertains to truck drivers involved in the delivery aspect of the respondent's operations at its Halton quarry. Approximately 40% of the manufactured product is obtained by the respondent's customers on "a pick-up basis." The balance is arranged through the delivery of the product by the truck drivers retained by the respondent.

5. The drivers own and maintain their trucks. Financing is arranged by them with-

out the collaboration of the respondent. No particular truck size is required by the respondent, although most drivers purchase the tandem variety. Licence, insurance and maintenance costs are absorbed by the driver. The P.C.V. licence secured by the driver is not restricted to the respondent's operations, although it may be confined to the haulage of construction materials manufactured at a quarry. The respondent may be of some service to the driver in helping him secure the P.C.V. licence. No particular amount of insurance is required by the respondent although it requires that the trucker satisfy it that insurance has been obtained. It is clear that the trucker would not be eligible for a P.C.V. licence if he did not carry an adequate amount of insurance.

6. There is no written contract negotiated between driver and respondent. The driver is paid on a ton-mileage basis based on a formula determined between the respondent and a committee appointed by the drivers. The committee apparently meets with the drivers and obtains instruction from them. The representatives thereupon negotiate the rates with the respondent. These rates are determined by zones arranged by distance from the quarry. The drivers' operating costs are obviously taken into consideration in determining the rate. Premiums for trips that require the driver to travel beyond a pre-arranged zone are mutually established. The driver is paid stand-by time and the customer is charged for the cost. Whether or not the customer agrees to reimburse the driver for stand-by time does not affect the driver's entitlement to the premium.

7. Most drivers arrange on their own initiative snow removal duties in the winter season. Cartage licences are obtained should the trucker engage in snow removal activities. Some, on isolated occasions, may purchase a load of gravel from the respondent and resell it at a modest profit. The respondent does not contribute to the driver's attempts to secure extra work in slow periods, such as in the winter months. Although when business at the Halton quarry appears to be slow the driver may be asked to attend one of the respondent's other quarries. He is under no obligation to comply, although most accept the opportunity. Some drivers in slow periods are able to find part time or casual jobs on construction projects or in industry. Drivers are not penalized should they refuse to accept loads that require a lengthy trip. One driver did indicate, however, that if he consistently refused the respondent would want a reason. Drivers appear to work on a full time, part time or casual basis. There is no compulsion to attend. Should the respondent find itself short of drivers it maintains a list of drivers on call who may be available. The respondent also has recourse to brokers, like Superb Truck Lines Ltd., in the event they need extra drivers. This is especially the case when the larger, tractor trailer, is needed. Some drivers have taken time off from their trucking concerns to work at other pursuits and have returned to Indusmin. There is no apparent restriction upon the truckers to quit the respondent to work for other quarry operators. Few do so, however. There is no dispute that the lion's share of the trucker's income generally is derived from revenue paid him for services extended the respondent. The evidence clearly established that a trucker does not, as part of his business, let his services on a regular basis to a number of other quarry operators. He does not advertise his services nor does he maintain a business outlet for the reception of his business calls.

8. The driver is paid bi-monthly by cheque. The respondent makes no deductions save for the purchase of gasoline at its premises. The trucker is responsible for securing his own hospitalization, Workmen's Compensation, pension and other benefits. He maintains a set of books and is responsible for the payment of his income tax. Capital depreciation on the truck is claimed. Vacations are scheduled when he wishes. Most take their vacations

when business is slow at Indusmin. He is not paid for vacation, statutory holidays or other absenteeism due, for example, to illness. The trucker attends work when he likes. He need not inform the dispatcher of his intention to not report but most, out of courtesy, do so. The amount of revenue he earns on a particular day is proportionate to the number of loads he delivers. The trucker who "hustles" will obviously earn more than one who does not.

9. The procedure for collecting loads is not unlike most quarry operations. The driver's truck may indicate his name. The respondent distributes each trucker with a number. Some may carry an "Indusmin" sign, but they are not obliged to do so. The sign is usually used for purposes of identification by the customer. The trucker does not wear an "Indusmin" uniform. The committee representing the drivers has negotiated with the respondent an orderly means of organizing the truckers for reception of their loads. Three groups of truckers are organized on the basis of their seniority with the company. The truckers with the most seniority are given priority with respect to the collection of loads. The truckers police the procedure for collecting loads. Starting times are set by the company in accordance with the seasonal dictates of the respondent's business operations. The procedure followed in the collection of loads does not vary from driver to driver. Once a load is obtained and properly weighed the driver determines the route, the speed and the moment of delivery to the customer. The driver takes his lunch hours and coffee breaks when he desires. Once a load is delivered he is paid by the customer. If the driver can't collect the customer signs a bill when the delivery is made. His overall chance for profit, having regard to the obligations he has assumed in purchasing and operating his truck, is commensurate with the number of loads he delivers during the course of a day.

10. The company very rarely has cause to reprimand, penalize or otherwise discipline its drivers. On one occasion a driver is alleged to have been abusive to a customer. The committee was approached by the respondent with a view to having the driver censured. The driver was reprimanded by his own committee. The driver is responsible for payment of his fines due to traffic violations and the costs of the break-downs to his truck, which may be attributable to faulty maintenance. The respondent does not require him to purchase a new truck or to trade in a truck that appears to have worn out its usefulness. The trucker's earnings, however, clearly is dependent upon the reliability of his vehicle's capacity to operate.

11. The respondent argues that the truck driver employed by the respondent falls under the test of the independent contractor as defined by common law. Moreover, because of the nature of his business and the manner in which he controls his affairs the driver ought not to be deemed to be an "employee" because is he alleged by the applicant to be "a dependent contractor." Counsel in this particular regard made some effort to distinguish the driver employed by Indusmin Limited from the driver employed by Nelson Crushed Stone and who was recently found to be a dependent contractor by this Board. (See: the *Nelson Crushed Stone Limited* case, [1977] OLRB REP. Feb. 204.) The applicant trade union argues the opposite, indicating that the drivers retained by the respondent are clearly "dependent contractors" within the meaning of the Act. Moreover, although there may be some distinctions to be made between the drivers employed by Indusmin and the driver in the case referred to, they are nevertheless relatively minor in context of the trappings of dependency identified by the Board.

12. Before proceeding with the merits of counsel's argument a subsidiary, or ancillary, issue arose incidentally during the course of the inquiry that ought to be disposed of at

this juncture. Counsel for the respondent alleges that the persons listed on Schedules "D" and "E" to the Labour Relations Officer's Report ought to be treated in the same manner as the person directly retained by Indusmin and listed on Schedules "A", "B" and "C" to the Report. The persons listed on Schedules "D" and "E" are drivers who are retained by "brokers" such as Superb Truck Lines Ltd. and Ridley J. Cartage. They are assigned from time to time to the respondent's Halton quarry at Milton. They are paid by those brokers and receive instruction from them on a day-to-day basis as to where they are to report. Some may be assigned to Indusmin on a casual but more permanent basis. Remuneration is determined through negotiation with the broker. The rates negotiated by the committee appointed on behalf of Indusmin's regular drivers do not apply to them. The driver assigned to Indusmin is not included in the arrangement negotiated by the committee for the reception of loads. The driver retained by the broker does not extend his services exclusively to Indusmin. He also works on a regular basis for other concerns. Once he is assigned to the Indusmin quarry, however, he operates with respect to the delivery of loads in the same manner as the Indusmin driver. The driver assigned by the broker is answerable to his broker and not to Indusmin for any difficulties in discharging his instructions. Indeed, the only instruction he receives from Indusmin is when he receives a load.

13. The respondent argued that all of the drivers reviewed, including the drivers assigned by brokers to Indusmin, ought to be treated as independent contractors. Nonetheless, should the Board determine that the drivers regularly employed by the respondent are dependent contractors then "the broker drivers" should be treated the same. That is to say, employees assigned by the brokers to Indusmin ought to be included on the list of employees for purposes of the count. Counsel for the applicant argues that even if these drivers are employees (which he alleges they are not because they are independent contractors) they are nonetheless employees of the broker and, therefore, ought not to be included on the lists.

14. The Board finds that the broker driver, assuming him to be an employee, holds a contractual relationship with the broker with respect to his terms and conditions of employment. The amount of his remuneration is negotiated with the broker, the nature and frequency of assignments are determined by the broker, the quality of his work performance is measured by the broker and the source of his income is controlled by the broker. His only contact with Indusmin is a functional one. That contact is dependent upon the decision of the broker's dispatcher to assign him to Indusmin. And in this regard Indusmin looks to the broker for the proper discharge of the driver's duties. The Board, therefore, finds "the broker driver" to be an employee (assuming but without finding that that is the case) of the broker and not the respondent. (See: the *Goldlist Construction Limited* case, [1967] OLRB Rep. 1016 Mar. at p. 1018; the *Women's College Hospital* case, [1971] OLRB Rep. Feb. 65.)

15. On the main issue the Board, having regard to the evidence and the representation of the parties, can find little merit in the distinctions made by counsel with respect to the employment status of Indusmin's drivers from those drivers found to be "dependent contractors" in the *Nelson Crushed Stone* case. The distinctions enumerated by the respondent may be summarized by the following:

- (i) there was no written contract of employment between the respondent and the driver;

- (ii) there was no formal assistance lent the driver by Indusmin in the financing of his truck;
- (iii) no special size, design or standard of truck was imposed by the respondent;
- (iv) the drivers were not required to carry any particular amount of insurance save that required by the Provincial authorities in determining his eligibility for the P.C.V. licence;
- (v) there existed a somewhat loose arrangement with respect to scheduling, reporting vacations and overall control of the delivery system;
- (vi) the drivers negotiated their remuneration, including standby pay, through the committee system. Preferred status determining priority for the collection of loads was also negotiated through the committee;
- (vii) outside or extra-curricular earnings were arranged by drivers independently of the respondent;
- (viii) discipline for a driver's refusal to receive a load, for example, was minimal, if non-existent; and
- (ix) the chance of profit varied considerably from driver to driver, depending upon the driver's inclination to "hustle" and deliver more loads.

16. The list of distinguishing features is, indeed, extensive, and ostensibly quite impressive. Nevertheless, the Board is satisfied that they do not justify the notion that the truckers are not dependent contractors. The test of "the dependent contractor" is essentially two-fold. Should the Board be satisfied that the driver, having regard to the nature and quality of his trucking operations be found to be inextricably tied to the enterprise of the entrepreneur, alleged to be his employer, to the extent that he more resembles an employee than an independent contractor, then he will be treated as "dependent" upon that entrepreneur and thereby will be concluded to be "an employee" for purposes of the Act. (See: *The Abdo Contracting Company Limited* case, (unreported) Board File No. 1295-76-U.) This is not to suggest, however, that the decision of a driver to attach his financial success to one entrepreneur is conclusive of a finding of dependency. Nevertheless, the absence of any indication by the driver to expand the parameters of his alleged business may very well justify the inference of dependency. In this particular case, save for the cartage of snow during the winter months when business is slow at Indusmin, the driver is shown to be patently without business initiative. He does not advertise his services or seek "the business" of other quarry operators. In short, he does not attempt to compete for other customers in order to achieve "a better deal" than that offered by Indusmin Limited. Counsel argues that this phenomena may be attributed to his seniority with the company and his preferred status in receiving loads. To quit the company and to apply his services to another customer would necessitate abandoning his privileges. With due respect, the Board cannot conclude a more significant

reason for finding the drivers to be dependent upon Indusmin. Surely the negotiation by the committee of appointed driver representatives of the loading arrangement, as well as the tariffs for remuneration, is almost conclusively indicative of the existence of an employer-employee relationship. What the drivers have purported to have achieved is the creation of a rudimentary, if not primitive, collective bargaining relationship with the respondent. The applicant's attempts to seek certification under the Act may very well be construed as an attempt to formalize what appears to be a *fait accompli*. In short, the existence of the committee that negotiates collectively some of the terms and conditions of employment of the drivers clearly, in our view, identifies them more as employees than independent contractors.

17. And it is in this context that the Board has viewed the attempts by counsel to distinguish the status of the respondent's drivers from those drivers in the *Nelson Crushed Stone* case. It is our view that their similarities are more meaningful and thereby reduce in significance their differences. That is to say, the vast proportion of their income is attributable to Indusman Limited. Whether the driver chooses to work on a part-time, casual or permanent basis is clearly up to him. And, indeed, whether he elects "to hustle" or not appears to be at the driver's discretion. But the true test of "dependency" must be measured in relation to the totality of the obligations he has assumed in undertaking the operation of a truck and the incidental expenses that are attached thereto. And indeed the efforts he has resorted to in securing a P.C.V. licence, in purchasing third party liability insurance, in satisfying creditors and such other incidental concerns in conducting his operations must be seen to determine his inclination to report for work at the respondent's quarry. The dictates of his financial existence determine the exercise of the driver's discretion in applying himself to his job. The obligations the driver assumes, and the expenses he incurs, can realistically be seen to establish the inherent nature of his relationship with the respondent. In the practical sense, these obligations are shown to relieve the respondent from the serious expenditures for which the driver purports to be compensated in the negotiation of the rates of his remuneration.

18. The absence of a written agreement in our view is not a positive factor in the determination of a business relationship. To the contrary, the Board would find the existence of a written contract, independently negotiated at arms length, more indicative of the driver as entrepreneur. We must emphasize, however, that the existence of a written contract is not a prerequisite for determining "the obligation to perform duties" for purposes of the definition of the "dependent contractor." The manner of payment is also not a factor in determining the driver's independence. The Board in many cases has in the past repeated that no significance can be attached to remuneration based on a purportedly "piece work" basis. The absence of the necessity for disciplining drivers is, in our opinion, a neutral factor. The Board suggests, however, that the reasonably mature employee, who applies himself in a diligent manner to his job responsibilities, is also without the need for discipline. And, finally, the fact that the company does not help the driver seek alternative employment when business is slow at Indusmin is also relatively unimportant. The significant feature, indicative of the employer-employee relationship, is that extra remuneration, when earned, is secured at a time when business is slow at Indusmin. That is to say, priority is given to the respondent in the service of his truck. In this context, his extra source of income is analogous to an employee engaged in "moonlighting" activities.

19. While the Board is mindful of the differences emphasized by the respondent in distinguishing the *Nelson Crushed Stone* case, we have concluded that the drivers reviewed

in this case, having regard to the evidence, are dependent contractors. Although the respondent may not exact the same demands upon the drivers with respect to the manner in which his affairs are conducted, nonetheless the driver, in context of the Legislature's purpose of introducing the "dependent contractor" on the employer-employee spectrum, is intrinsically more analogous to the employee in his relationship with the respondent. The obligations he assumes and the rewards he receives for his service entitle the driver to the benefits of collective bargaining.

20. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

21. The Board further finds that all employees engaged as drivers working at or out of the respondent's Halton Quarry, Milton, Ontario, save and except dispatcher, persons above the rank of dispatcher, office staff and persons represented by subsisting collective agreements, constitute a unit of employees of the respondent appropriate for collective bargaining.

22. For purposes of clarity "all employees" refers to drivers found to be "dependent contractors" under section 1(ga) of The Labour Relations Act and, therefore, are to be treated as employees under section 1(gb) of the Act.

23. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on the Sixteenth day of November, 1976, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

24. A certificate will issue to the applicant.

25. The dissent of Board Member F.W. Murray will be issued in due course.

DECISION OF BOARD MEMBER F.W. MURRAY

1. I dissent.

2. I am of the opinion that there are very important distinguishing features in the employment relationship of those employed by Indusmin Limited from those employed by Nelson Crushed Stone (see: *The Nelson Crushed Stone Limited* case, [1977] OLRB Rep. Feb. 104.) Some of these distinguishing features are of little consequence, such as the existence, or lack of it, of a written contract between the Respondent and the owner-operator, except as it might be used to assist in the arranging of a loan (see paragraph 5.) However, there are a number of others which to me would lead to a different conclusion than that reached in the Board's decision.

3. I will deal with these distinctions put forward by the Respondent generally in the same order in which they have been enumerated in the Decision, commencing with paragraph 15 supra.

4. I believe the fact that the owner-operators arranged for the purchase and financing of their vehicles completely independently of the Respondent, to be a very significant consideration. This Board and other boards, both Provincial and Federal, have dealt with cases in which financing has been arranged, or in some way assisted by the Respondent company. There is no doubt that in such cases, such financial obligations can have a real bearing on the overall relationship between an owner-operator and the customer or customers he is serving. Obviously an owner-operator who has on his own arranged for the purchasing and financing of such equipment has no financial obligation to his customer and accordingly could be considered much more "independent" than an owner-operator whose truck financing has in some way been arranged or assisted by the firm with whom he is doing business.

5. I would also not characterize the absence of any financial backing as merely "no formal assistance." My notes indicate that there was no assistance whatsoever, formal or informal. Moreover, it is important to note that in the absence of any written general agreement between the owner-operator and the Respondent Company, the owner-operator does not have even the assistance of presenting such a document to a bank or other lending institution in arranging any loan which might be necessary to purchase the vehicle.

6. In the case before this Board, the Respondent did not require any special design or standard of truck. It follows therefore that the owner-operator would have a greater ability should he feel it necessary at any time to turn to other sources of revenue, by purchasing and operating a more general usage bulk haulage vehicle as opposed to a bulk haulage vehicle with specifications for optimum efficiency for operating out of the Respondent's quarries.

7. While on the subject of design and standards of truck and equipment, the fact that the trucker was not obliged to carry an Indusmin sign is also indicative of a less structured arrangement in that the absence of any labelling can readily facilitate at a moment's notice the truck being operated for other customers of the owner-operator should he see fit to render such services.

8. Further evidence of a less restricted relationship is also borne out in the fact that the Respondent does not require any specific amount of insurance. Indeed the only insurance carried by the owner-operator is that necessary and required of him as a holder of a P.C.V. licence. The evidence was also clear that the P.C.V. licences held by the owner-operators were generally of a more open nature and not just confined to the haulage of construction materials originating at a quarry. As I understand the evidence all of the owner-operators are free to haul under their P.C.V. licences for customers other than merely the Respondent and many are free to haul all types of material moved in bulk, not just from quarries, but all bulk material suitable for haulage in a large dump truck.

9. In acquiring any P.C.V. licence, the Applicant must prove public necessity and convenience and tenders to the Highway Transport Board by way of evidence from potential customers the need for his services. It must therefore be assumed in these more general licences issued to many of the owner-operators involved in this case that they had support from potential customers other than the Respondent, or otherwise the P.C.V. licence would have been limited to haulage only for the Respondent.

10. The Respondent had very little direct control over the hour to hour and day to day scheduling of work. Indeed, the taking of vacations, and the necessity to report in booking off from work directly to the Respondent also exhibits a much looser arrangement between those rendering the services and those purchasing the services. The evidence with respect to these matters is quite different from that existing in the *Nelson Crushed Stone* case.

11. The fact that a committee of owner-operators negotiated with the Respondent with respect to such matters as remuneration and rules determining priority of loads and application of a form of seniority or length of service in the assignment of such loads does indicate that a form of collective bargaining has taken place, which seems to me to be quite rational and reasonable in the light of all the circumstances. I do not agree however, that this application for certification by the Applicant should be characterized as "an attempt to formalize what appears to be a 'fait accompli' ". To me there is quite a difference between a form of joint consultation in arriving at, not only remuneration, but matters related to assignment of work, as opposed to collective bargaining, which may at the end lead to the withdrawal of services in concert. Put another way, the fact that the Respondent has developed an intelligent and mature relationship with the Respondent's contractors to a point where they have jointly developed a bi-partite form of consultation in determining such matters, even by way of a representative committee, would not lead to the conclusion that the contractors were any the less "independent." It is one thing to have joint consultation on such matters as remuneration and assignment of work, and it is quite another thing to clothe such a process with the right to withdraw services in concert. I fail to see that the existence of joint consultations on such matters should, even in part, lead to the conclusion that these truckers were inextricably tied to the Respondent's enterprise.

18. To the extent that there is a greater or lesser availability of those with the proper machinery to perform the tasks required by the Respondent is of considerable importance and to this extent the ownership of the "tools" can likewise be important and should have a bearing on the Board's decision.

19. Probably the most important element in making a decision as to the degree of dependency or independency should be the matter of control exercised by the user of the services over those tendering the services. In this respect, having regard for all of the evidence, I would have concluded that there was a much greater degree of control exercised by the Company in the *Nelson Crushed Stone* case than that exercised by Indusmin in the case now before the Board. I would also have concluded that there is a greater degree of chance of profit and indeed risk of loss in our case than there was in the *Nelson Crushed Stone* case.

20. Accordingly I would have found the owner-operators were not inextricably tied to the Respondent and their relationship did not in fact resemble that of an employee. I therefore would have dismissed this application for certification.

2155-76-R United Brotherhood of Carpenters & Joiners of America, A.F.L., C.I.O., C.L.C., (Applicant), v. Viceroy Construction Company Limited, (Respondent).

Certification – Whether employer propaganda campaign exceeds limits allowed by the Act – Whether circumstances justify certification pursuant to section 7a of the Act.

BEFORE: M. G. Picher, Vice-Chairman and Board Members M. J. Fenwick and F. W. Murray.

DECISION OF THE BOARD: September 9, 1977.

1. This is an application for certification in which the Board, by its Order dated July 28, 1977, certified the applicant pursuant to section 7a of the Act. The Board stated that written reasons for that decision would follow, and this decision is provided pursuant to that undertaking.

2. The applicant originally requested the taking of a pre-hearing vote. A vote was conducted among the employees in the proposed bargaining unit and the outcome was unfavourable to the applicant. The Union then requested the Board to exercise its jurisdiction to issue a certificate notwithstanding the result of the vote. It alleged that prior to the taking of the vote the employer engaged in a propaganda campaign that exceeded the limits imposed by the Act, the effect of which was to deprive the employees of their ability and their right to freely indicate in a vote whether or not they wished to be represented by the union.

3. At the hearing a preliminary motion for dismissal was raised by the respondent. It argued that the Board should not hear the complaint brought by the union because the union made no objection to the employer's conduct until the result of the vote was known. The employer took the position that the union should not be permitted to in effect by its silence acquiesce in the employer's conduct and then raise an objection only when it saw that the vote was lost, so as to have, in effect, two bites at the cherry. In support of its position it cited the Board's decision in *Chateau Gardens (London) Inc.*, [1977] OLRB Rep. Jan. 12. The Board reserved its decision on the preliminary motion and, as was implicit from its order granting the certificate, it ultimately denied it.

4. The facts in this case are distinguishable from those in the *Chateau Gardens* case. In *Chateau Gardens* two unions were competing for certification by way of a representation vote. The trade union that lost the vote objected to certain alleged breaches by the rival union of the 72 hour silent period that preceded the vote, but did so only after it learned that it had lost the vote. The Board was satisfied that the complaining union was aware of the alleged breaches in sufficient time to raise its objections before the taking of the vote. That would have allowed the Board to remedy any prejudice created merely by postponing the vote to a later date, thereby avoiding the more disruptive corrective step of taking a second vote. The Board's view was that in that circumstance there was some duty upon the complaining union to act promptly in its objection.

5. Those considerations do not apply in this case. Here there can be no question of a second vote if the complaint is well founded since the futility of any vote is central to the

union's case. Secondly, even if the objection now being made had been made to the Board prior to the taking of the vote it is doubtful that the Board could have made any remedial order such as postponement, since the union's position would then have been that no vote, including a postponed vote, could reveal the true wishes of the employees. The Board's choice then would have been to hear the section 7a application directly or to delay the hearing of that question until after the taking of the vote. The Board might well, in that situation, have allowed the vote to proceed, if for no other reason than that the union's concern might be shown, on the counting of the ballots, to have been premature. That is to say, in all probability, the practical outcome would have been the same whether the complaint had been made before or after the vote. For these reasons the respondent's preliminary motion for dismissal was denied.

6. We turn now to the merits of the complaint. Section 7a provides as follows:

- 7a. Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

7. As the Board noted in *Dylex Limited* (Board File No. 1500-76-R, June 29, 1977, as yet unreported) three separate requirements must be met before section 7a can be applied: firstly it must be established that an employer has contravened the Act; secondly the Board must be satisfied that the contravention has led to the likelihood that the employees will be inhibited from expressing their true wishes; and thirdly, in the opinion of the Board the trade union must have sufficient membership strength for the purposes of collective bargaining in the unit in question. When all of those conditions are met the Board may exercise its discretion to issue a certificate notwithstanding the negative result of a representation vote.

8. The first issue is whether the employer has violated the Act. Section 56 of the Act imposes certain standards of conduct on an employer engaging in the kind of electioneering that typically precedes a representation vote.

56. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

9. Insofar as it relates to freedom of expression that section seeks to balance two competing interests. On the one hand it protects the right of an employer to express his

opinion in opposition to a trade union. On the other hand it recognizes the sensitive nature of employment relationships and protects employees from utterances of an employer that would have a coercive impact on their decision whether or not to be represented by a union.

10. The legislative scheme anticipates that having been exposed to the views of both employer and union the employees should decide for themselves. To insure the independence of their decision section 61 of the Act prohibits intimidation or coercion of employees by a trade union and section 56 imposes a similar restraint upon an employer. But while section 61 prohibits "intimidation and coercion" section 56 is extended to include a prohibition of "coercion, intimidation, threats, promises or undue influence". Implicit in the broader reference to threats, promises and undue influence, is the recognition that employees may be especially vulnerable to the influence of their employer.

11. The Act recognizes that an employer is in the more immediate position to affect an individual's employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual's employment. Therefore, by the terms of the Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person's job security or conditions of employment when the employer's action is prompted by an anti-union motive, (e.g. section 58 of the Act). For the same reason, by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his view of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security. Such conduct, apart from violating section 56, would be contrary to section 58(c) which provides:

58. No employer, employer's organization or person acting on behalf of an employer or an employers' organization,

(c) shall seek by threat of dismissal, or by any other kind of threat, or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

12. The protection of the integrity of the individual's employment relationship is central to the scheme of The Labour Relations Act. This Board has consistently found breaches of the Act where statements have been made which threaten an individual's employment, and that has been so whether the threat was made by a union (e.g. *Walter Selck of Canada Limited*, [1964] OLRB Rep. 138; *V/R Wesson Limited* [1968] OLRB Rep. Nov. 811) or by an employer (e.g. *Bell & Howell Canada Ltd.*, [1968] OLRB Rep. Oct. 695).

13. With those considerations in mind we turn to the facts in this case. The union's complaint is that the contents of two letters signed and circulated by the employer to all employees prior to the vote amount to a breach of the Act. The first letter is dated April 12, 1977 and contains, in part, the following:

Question: "If the Union gets in, will there be a strike?"

Answer: If the Company and the Union cannot agree on the terms of a contract then there is a possibility that there would be a strike. Strikes often last months and create great hardship. Can you afford to be without a job for three or four or five or six months?

Question: "Can the Union provide me with job security?"

Answer: NO. No Union can provide me with job security. You can only achieve job security by working together to produce a quality product at a competitive price.

Question: "If the Union gets in, does this mean that the Company will have to give the employees what the Union promises?"

Answer: NO. Although the Company is required to bargain in good faith and attempt to make an agreement, the Company is not required to agree to anything which it feels will make it uncompetitive.

Question: "Can we collect Unemployment Insurance while we are on strike?"

Answer: NO.

Question: "Can I lose my job if the Union takes me out on strike?"

Answer: YES. Under Ontario Law, in order to save his job an employee must offer to return to work within the first six months of a strike. After a strike has lasted six months no employee has any right to his job.

Question: "If I go out on strike can the Company hire other people to do my job?"

Answer: YES.

14. The second letter dated April 15, 1977 was distributed to the employees on Friday the 15th, one day before the onset of the 72 hour "silent period" ban on electioneering prior to the taking of the vote on April 20, 1977. That letter contained, in part, the following:

The Union talks about job security. It is our position that the Union does not provide jobs or job security but that jobs and job security are only provided by a company and employees working together to produce a quality product at a competitive price ...

One last thing about job security. While Unions like to talk about job security, they never tell you that there is nothing they can do to provide jobs in the event that a business ceases to be economical and it is necessary to close down. We are attaching to this letter some photos of clippings that appeared in recent Toronto newspapers that show that when a company decided to close down the Union was powerless to provide job security ...

Appended to the letter are reproductions of five newspaper clippings, the headlines of three of which are:

1. "DOMTAR TO CLOSE MILL, 176 WORKERS LOSE JOBS".
2. "DOMTAR CLOSING ITS PAPER MILL IN GEORGETOWN".
3. "DECISION FINAL: PLANT TO CLOSE IN GEORGETOWN".

The second and third headlines are from the Toronto Star of October 28, 1976 and November 8, 1976, respectively and they are followed by brief news reports. The gist of those reports is that the economics of new technology had forced the closing of a Domtar plant that produced coated papers in Georgetown. The third article states:

Company officials reiterated that they could not continue to operate the 66 year old plant because it was no longer economical.

To remain competitive in today's market, they said, a paper-coating plant must be integrated with a paper mill ...

The next two clippings reproduced on a separate page, have a distinctly different tone. Their headlines are:

- 1) "ETOBICOKE FIRM MOVING TO BUST UNION - STEWARD".
- 2) "WEEPING WORKERS AT FAREWELL PARTY".

They are from the Toronto Star of November 12 and November 22, 1976, respectively. The reports beneath them describe the closing of the plant of Miami-Carey Ltd, who were then makers of home fixtures in Etobicoke. The first article states:

A North Etobicoke company with 175 employees is moving to Barrie to get rid of its union, a shop steward charged yesterday ... Officials of the United Electrical Workers, Local 518, have been told their 125 members can apply for jobs in the new plant, but they will lose their seniority, their union and their rate of pay and will compete on an equal basis with the Barrie applicants.

The second article says that the plant

...is scheduled to close Jan 7 and move to Barrie for what management terms 'economic reasons'. Union officials charge that the company is moving to get rid of its union.

The article then describes a farewell party, relating

One woman cried all afternoon. It was sad.

15. The question before the Board is whether the effect of the employer's message as embodied in the two letters and the attached clippings would be to coerce, intimidate, threaten or unduly influence a reasonable employee so as to deprive him of the ability to vote freely in the selection or rejection of trade union representation by the applicant. We are satisfied that the message conveyed by the employer would have that effect.

16. The line between legitimate persuasion and unlawful intimidation is not susceptible of any precise definition in the abstract. It falls to be determined on the totality of circumstances in each particular case whether the standards of restraint imposed by The Labour Relations Act have been exceeded. The facts at hand extend beyond the line of what is permissible.

17. The repeated references to job security that appear in the employer's letters coupled with the spectre of another plant closing under a cloud of unresolved allegations of union busting raises what in our view must reasonably be perceived as a veiled threat to employment security by any employee who has a normal desire to keep his job.

18. The employer sought to justify these communications on two grounds. Firstly, it argued that by the news clippings it was merely stating facts and not making any threat. Secondly, it contended that its message on job security was a necessary and fair response to the promise of security for employees that was the central theme of the union's recruitment campaign.

19. We deal with the second submission first. It is, of course, open to an employer to express his views and state to his employees certain facts relating to issues raised in a representation campaign. But nothing, including representations by the union that might themselves be in breach of The Labour Relations Act, can justify resort by an employer to the self-help of threats and intimidation that exceed the standards of restraint imposed by the Act. Secondly, the suggestion that the news clipping containing allegations that an employer had shut down its plant to rid itself of a union is mere fact invites this Board to ignore common sense human response. Fire, flood and other external conditions may also cause plants to close, but the employer has chosen to put before the eyes of its employees the example of a plant closing for the alleged purpose of destroying a union. The resulting suggestion, however factual, that some employers are prepared to destroy employees' jobs in order to destroy their union is an object lesson not wasted on employees of normal sensitivity. It is a statement by example that could reasonably be perceived by the employees as a clear threat to their jobs.

20. On the basis of the above we are satisfied that the respondent has violated the standard of restraint imposed by section 56 of the Act and that its contravention of the Act is such that the true wishes of the employees are not likely to be ascertained.

21. Does the applicant have membership support adequate for the purposes of collective bargaining? We find that it does. Membership support that is adequate within the meaning of section 7a does not necessarily mean majority support. That section was obviously intended to apply where an application for certification is made by way of a pre-hearing vote. In that situation no more than 35% of the employees in the proposed bargaining unit need be members in order for the Board to order a vote. Momentum can be important in an organizing drive and a trade union might decide to cut off its membership card campaign at or slightly above that threshold in order to obtain the benefit of an early vote rather than seek outright certification. We are satisfied that the Legislature did not intend that a trade union and employees in that circumstance should be any less entitled to the protection of section 7a where the three criteria set out in that section are met.

22. That is not to say however that membership strength of 35% must automatically

be seen as adequate membership support. No arbitrary percentage can be arrived at that will apply in all cases. The Act requires the Board to determine what is adequate membership support by the light of its own opinion depending on the facts of each case. In forming its opinion in any case the Board must have regard to all of the surrounding circumstances. Relevant factors include whether the employer's contravention of the Act occurred early or late in an organizing campaign, the nature and gravity of the contravention itself and the relative strength and influence of the employee members on other employees within the bargaining unit.

23. In the instant case the applicant initially requested a pre-hearing vote. It filed some 28 membership cards representing 40% of a bargaining unit of 70 employees. Notwithstanding the veiled threats made against the employees by the employer in an obviously heated electioneering campaign the union membership was sufficiently strong to hold its ground and sway still more employees to its side. We are satisfied, in those circumstances, that the applicant has membership support of a quality and quantity adequate for the purposes of collective bargaining in the bargaining unit described in paragraph 3 of the Board's Order dated July 28, 1977.

24. For all of the above reasons the Board exercised its discretion to issue a certificate pursuant to section 7a of The Labour Relations Act.

0719-77-M Dravo of Canada Limited, (Employer), v. United Brotherhood of Carpenters & Joiners of America, Local 2486, (Trade Union).

Reference – Whether Minister has power to appoint conciliation officer where notice to bargain does not comply with section 45 – Whether section 45 time periods mandatory or directory.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and F. D. Kean.

APPEARANCES: *Robert E. O'Connell, L. Finlay Walker, Deirl A. Dale and Thomas R. Pich appearing for the employer; P. E. Guertin appearing for the trade union.*

DECISION OF THE BOARD: September 16, 1977.

1. A request has been made to the Minister of Labour under section 15 of The Labour Relations Act by the trade union for the appointment of a conciliation officer. Questions have arisen that, in the opinion of the Minister, relate to her authority to make the appointment.

2. The Minister has referred to the Board pursuant to section 96 of The Labour Relations Act the question as to whether she has authority under The Labour Relations Act to appoint a conciliation officer.

3. The facts which give rise to this reference are not in dispute. The employer and

the trade union were parties to a collective agreement which covered "carpenters, carpenters' apprentices, sub-foremen and foremen, save and except those employees above the rank of foreman, miners and shaft men, employed on the projects of the [employer]..." The collective agreement covered "all the area within the District of Sudbury, lying south of the northwestern angle of Margaret Township on a line projected easterly to the northeastern angle of Sladen Township, and including the mainland portion of the District of Manitoulin lying adjacent to the District of Sudbury" ("the area").

4. Article II of the collective agreement provides:

DURATION AND RENEWAL

This Agreement shall become effective on the 1st day of September, 1972, and shall remain in effect until the 31st day of August, 1973.

Either of the Parties to this Agreement may give notice in writing to the other Party herein, not more than ninety(90) days before the Agreement ceases to operate, of their intention to renew or revise this Agreement, and negotiations shall forthwith commence between the Parties.

5. The parties agreed that the collective agreement had expired on August 31, 1973, and that on June 21, 1977, the trade union had given the employer written notice to bargain with a view to making a collective agreement. From the currency of the collective agreement which expired on August 21, 1973, until June 21, 1977, there was no contact between the parties. Since 1973 the employer has not employed carpenters in the area until the summer of this year.

6. In a telegram to the Ministry of Labour dated July 11, 1977, the employer opposed the trade union's request for the appointment of a conciliation officer on the grounds that there is presently in existence of a collective agreement between the employer and the Labourers' International Union of North America, Ontario Provincial Council, Local Union 493, ("the Labourers") which covers the work over which the trade union seeks jurisdiction and that this collective agreement would remain in effect until September 1, 1978.

7. Although the Labourers were served with notice of this reference and of the hearing they did not appear at the hearing. In addition, the collective agreement between the employer and the Labourers was not produced before the Board. Upon inquiring into the position of the employer, it became apparent that it was referring to an apprehended conflict in jurisdictional claims between the trade union and the Labourers rather than to two conflicting bargaining units. On the representations before it, the Board finds that there is nothing which is contained in the telegram dated July 11, 1977, which adversely affects the Minister's authority to appoint a conciliation officer.

8. At the hearing and without any objection from the trade union, the employer argued three new grounds in support of its position that the Minister had no authority to appoint a conciliation officer. For the first ground it was argued that the notice given on June 21, 1977 was beyond the period set forth in section 45(1) of The Labour Relations Act. For the second ground it was argued that the notice of June 21, 1977, was not in accordance with article II of the collective agreement and was therefore not notice under section 45(2)

of The Labour Relations Act. For the third ground it was argued that the trade union had abandoned its bargaining rights.

9. Sections 15(1), 45(1), and (2) state:

15(1) – Where notice has been given under section 13 or 45, the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.

45(1) – Either party to a collective agreement may, within the period of ninety days before the agreement ceases to operate, give notice in writing to the other party of its desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement.

45(2) – A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection 1.

10. The collective agreement between the parties expired on August 31, 1973, and does not contain any provision for its renewal in the absence of notice in writing. However, while the employer and the trade union have not been parties to a collective agreement since August 31, 1973, that fact, in itself, does not terminate the trade union's bargaining rights with respect to the employees of the employer who are referred to in paragraph three. The bargaining rights of the trade union flow from the agreement and not the original certification and remain in effect until they are terminated by the Board. See *Regina v. Ontario Labour Relations Board, Ex parte Lakehead Registered Nursing Assistants Bargaining Association* (1969), 2 O.R. 597, 603.

11. Given the continuance of the trade union's bargaining rights, the Board now considers the effect of the provisions of section 15(1) and 45(1) and (2) of the Act. Notice under section 45 enables either party to a collective agreement to request the Minister to appoint a Conciliation officer. Section 45(1) provides that notice in writing may be given by either party to a collective agreement within the period of ninety days before the agreement ceases to operate of a desire to bargain with a view to the renewal, with or without modifications, of the agreement then in operation or to the making of a new agreement. Section 45(2) provides that notice in accordance with the provisions in the agreement relating to its termination or renewal shall be deemed to comply with section 45(1).

12. The question arises as to whether the periods of time which are set forth in section 45 are mandatory or directory. Is it possible for a party to a collective agreement which has expired to give notice in writing pursuant to section 45? In our view the answer to the question is in the affirmative. As the Board stated in the *Peel Memorial Hospital* case, (Board File No. 0456-77-M) unreported decision dated July 28, 1977:

27. Section 45 does not say that if either party wants to give notice to bargain it *shall* be within the ninety day period. The purpose of providing a limited period at the end of an agreement for the giv-

ing of notice to bargain is to provide stability between the parties for as much of the agreement as possible. At the same time, however, it is desirable to provide a sufficient time prior to the termination of the agreement to enable the parties to conclude, if possible and if desired, a successor agreement. Notice informs the other party and the public that negotiations will follow. Once notice is given certain rights, duties and obligations follow to enable the parties to carry out their negotiations.

For these reasons the Board finds that the periods of time which are set forth in section 45(1) and 45(2) are directory rather than mandatory and that where notice, as in the instant case, has been given and the trade union's bargaining rights have not been terminated, such notice is notice under section 45 of the Act. It follows the where notice has been given under section 45 and upon the request of either party the Minister is required to appoint a conciliation officer.

13. The Board now considers the third ground which was advanced by the employer. The employer referred to several decisions of the Board which enunciated the proposition of the abandonment of bargaining rights by trade unions. Some of these decisions were written before (and some after) the decision of the Ontario Court of Appeal in *Brayshaws Steel Ltd.* (1971), 26 D.L.R. (3d) 153, where Jessup, J.A. stated at p. 159:

The question therefore is whether the Board had the power to make the vitiating declaration that it did. No such express power is asserted but it is said that such a power is to be implied from the words in s. 5(1) of the statute, "are not bound by a collective agreement". These words are said to empower the Board not only to find whether there is in existence a collective agreement within the meaning of s. 1(1)(c) and to find the employees affected by it but also to find, on the application of such equitable principles as the Board may think proper, whether the agreement is operative for any purposes. Clearly the Board has no inherent jurisdiction. Since its powers are statutory they must be found in clear language of necessary intention. In my opinion the only powers conferred on the Board by s. 5(1) are to ascertain whether a collective agreement within the meaning of s. 5(1) exists and to determine the persons such agreement affects; the words "bound by" in s. 5(1) simply express the legal result of s. 37 of the statute. That section binds the Board as well as the parties to a collective agreement. In my view the quoted words from s. 5(1) could read, in the same sense, "are not included in (or affected by) a collective agreement". Where the Legislature has deemed it expedient for the Board to have power to render a collective agreement inoperative, it has granted the power by express words as in s. 45a(4) [enacted 1964, c. 53, s. 5; rep. & sub. 1970, c. 85, s. 20(2) (now s. 52(4))], an express grant of power which would be redundant if the Board has the equitable jurisdiction contended for. It is also significant that ss. 39, 42, 43 and 44 [now ss. 44, 48, 49 and 50] also expressly provide that, upon certain findings by the Board, collective agreements cease to operate.

The only indirect reference to abandonment in the Act is found in section 49(5) where a trade union may inform the Board that it does not desire to continue to represent employees in the bargaining unit. However, even assuming for the purpose of argument that the Board does have the power under The Labour Relations Act to find abandonment of bargaining rights, the Board is of the view that the facts set forth in the reference would not support a finding of abandonment of bargaining rights by the trade union. Where there has been an absence of employees (as is not uncommon in the construction industry) who would be covered by successive collective agreements, the lack of contact by the bargaining agent with the employer during the period of such absence would not support a finding of abandonment of bargaining rights by the trade union. In this regard see the *Dominion Bridge Company Limited Mount Dennis Plant* case, [1971] OLRB Rep. Apr. 201, 204.

14. Having regard to the foregoing reasons, the answer to the question posed by the Minister, in our opinion is "yes".

0477-77-R, 0476-77-U, 0518-77-U, 0575-77-U. International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel & Restaurant Employees and Bartenders International Union, A.F.L. – C.I.O. – C.L.C., (Applicant), v. 251628 Holdings Limited trading as **Jimmy'z II**, (Respondent).

Successor Status – Collective Agreement – Section 79 – Discharge for Union Activity – Whether there has been a sale of a business – Whether character of business has changed – Whether successor bound by collective agreement – Whether terminations motivated by anti-union animus.

BEFORE: A. L. Haladner, Vice-Chairman, and Board Members N. B. Satterfield and O. Hodges.

APPEARANCES: Beth Symes and Julius Troll for the applicant/complainant; G. Grossman and Jimmy Zazza for the respondent.

DECISION OF THE BOARD: September 29, 1977.

I

1. The name: "Jimmy'z II formerly known as the Red Lion Inn" appearing in the style of cause of these matters is amended to read: "251628 Holdings Limited trading as Jimmy'z II".

2. On Friday, June 10, 1977, the respondent leased from Trans – Nation Inc. ("TN") the real property and chattels of the premises at 467 Jarvis Street, then known as the Red Lion Inn (the "Red Lion"). The following Monday, June 13th, the 5 men who had been employed by the Red Lion as beverage waiters were informed by the respondent that they would not be continued in their former position. That same day, the respondent hired 25 female employees, some of whom, in addition to carrying out the functions previously performed by the 5 male waiters, namely, the serving of beer, commenced to perform vari-

ous types of burlesque entertainment. On June 28, 1977 the waiters received from the respondent notices of termination pursuant to the provisions of the Employment Standards Act.

3. The applicant filed an application under section 55 of The Labour Relations Act alleging a sale of the business at 467 Jarvis Street by TN to the respondent. The applicant seeks a declaration that the respondent is bound, as a successor employer, by the collective agreement which it alleges was in existence between itself and the Red Lion at the time of the sale. In the alternative (if the Red Lion was not bound by a collective agreement at the time of the sale) the applicant seeks a declaration requiring the respondent to recognize the applicant as the bargaining agent for its employees in the like bargaining unit for which it formerly held bargaining rights. In its reply to the section 55 application, the respondent denies that a sale of a business within the meaning of section 55 has occurred and also that the Red Lion was a party to a collective agreement at the time of the alleged sale. In the alternative, the respondent seeks a declaration terminating the bargaining rights of the applicant because the business has changed its character so as to be substantially different from the business of the predecessor employer. In addition to the section 55 application, the applicant filed a complaint under section 79 of The Labour Relations Act alleging that the terminations of the aforesaid 5 waiters by the respondent were in violation of section 56, sections 58(a) and (c) and section 61 of the Act, and were part of an attempt by the respondent to unlawfully rid itself of trade union representation. The respondent was alleged to have attempted to induce an official of the applicant to withdraw union affiliation, in violation also of section 56, and to have violated section 58(b) and section 59(2) in its dealings with the terminated employees. The applicant also filed an application under section 83 of The Labour Relations Act alleging an unlawful lockout.

4. At the hearing, the Board joined the section 55 application and the section 79 complaint so that the evidence common to both could be heard at the same time. Because the section 79 complaint and the section 83 application were in respect of the same conduct, and because the relief sought in each was similar in nature, the Board determined not to proceed with the section 83 application at this time.

II

5. It is clear that a sale of a business, within the meaning of section 55 of The Labour Relations Act, has occurred. The evidence establishes that the respondent, on June 10, 1977, took over the complete operation of the business located at 467 Jarvis Street. The transaction in question was carried out in accordance with a leasing agreement between TN, the owner of the Red Lion, and 251628 Holdings Limited, the holding company which, through its president, Jimmy Zazza, controls and directs the respondent. Under the terms of the lease, the lessee was permitted to occupy and operate the premises at 467 Jarvis Street for a term of 10 years at a rental fee of \$40,000.00 a year plus increments. The lease was made conditional upon the consent of the Liquor Licence Board of Ontario to the transfer of the beer licence (the most essential ingredient of the business) from the lessor to the lessee. In the lease, the lessor agreed to transfer that licence to the lessee for one dollar, such transfer to take effect upon L.L.B.O. approval. The Board was informed that the respondent was entitled, under the lease, to make use of the chattels remaining in the rented premises. These chattels included a number of tables and chairs as well as a supply of beer glasses. In addition to the foregoing, the respondent purchased from TN, by separate transaction, and

for an amount in excess of two thousand dollars, the stock of beer on hand. In these circumstances, the Board finds that there has been the requisite continuation of the business carried on under the name the Red Lion by the respondent, 251628 Holdings Limited trading as Jimmy'z II. (See: *Aircraft Metal Specialists*, [1970] OLRB Rep. Sept. 702; *Robes Royale*, [1973] OLRB Rep. Nov. 600; *Dufferin Steel Company, Awico Division*, [1976] OLRB Rep. Mar. 81 and *Marvel Jewellery Limited*, [1975] OLRB Rep. Sept. 733.)

6. The substantial issue in this case is whether the respondent is entitled to the relief afforded by section 55(5) of The Labour Relations Act. Under that section, the Board may terminate the bargaining rights of a trade union, if, in its opinion, "the person to whom the business was sold has changed its character so that it is substantially different from the predecessor employer".

7. The evidence establishes that the predecessor employer carried on what was described by one witness as "a regular pub". The Red Lion offered draught as well as a wide selection of bottled beer. This beer was served by the 5 waiters who are the subject of the applicant's section 79 complaint. In addition to the 5 waiters, the Red Lion employed two tapmen and one busboy. Live entertainment in the person of a folk or country rock singer was provided on Thursday, Friday and Saturday evenings; and, as well, the patrons of the Red Lion had the use of two pool tables, a pinball machine and an indoor shuffleboard apparatus located in a room which was set aside for games. The gaming equipment was rented by TN from Universal Equipment of Canada under a shared proceeds arrangement. The main source of the Red Lion's revenue derived from the sale of beer, a large percentage of which was sold during the summer months on the patio outside the building. At the Red Lion, a draught beer cost 35 cents. There was no cover charge. The Red Lion also derived some rental income from its kitchen, which was operated as an independent concession.

8. In addition to the introduction of an entirely new format for entertainment (see paragraph 10) the respondent introduced a number of changes with respect to the physical appearance of the premises at 467 Jarvis and with respect to the type and cost of refreshment offered. The respondent changed the lighting and seating arrangements and installed some larger tables and chairs as well as four continuous play jukeboxes. It also undertook some repainting and wallpapering and put up some interior advertising signs and photographs of the entertainers. Further, the respondent replaced the previous hand-painted exterior sign with a 30-foot long neon model.

9. Like its predecessor, the Red Lion, the respondent has no liquor licence and, accordingly, its beverage menu is restricted to beer. The respondent serves the same type of draught beer as the Red Lion. However, it carries only Heinekens in bottles. The respondent's draught beer costs 55 cents on the patio and 75 cents in the entertainment areas, which are located inside the premises. The revenue of the respondent is derived primarily from the sale of beer, most of which is sold inside. There was, however, as of the date of the Board's hearing a cover charge of two dollars in the entertainment areas. The respondent has discontinued the kitchen service at 467 Jarvis Street. It does, however, sell cigarettes. The respondent also derives some income from the gaming equipment, some of which is new, but all of which is rented from Universal, also under a shared proceeds arrangement.

10. The major change in the business carried on at 467 Jarvis Street relates to the

quantity and, more significantly, the type of entertainment provided. The respondent offers continuous live entertainment during its hours of operation – twelve noon to twelve midnight. This entertainment is of a distinctly burlesque variety. Specifically, it consists of topless and nude disco dancing, nude billiard, shuffleboard and backgammon playing, and a lingerie fashion show. The entertainment is provided exclusively by female employees, all of whom were hired after the sale of the Red Lion to the respondent. The Board was informed that the customers of the respondent who, according to Mr. Zazza, are of a completely different type from those that frequented the Red Lion, are permitted to participate in the games, but not in the dancing and fashion show.

11. As of the date of the Board's hearing, the respondent employed 28 employees, of whom 24 were new and female. The remaining 4 employees comprise the 2 tapmen and busboy previously employed by the Red Lion and a male doorman/bouncer, hired after the sale. Of the 24 female employees, some work exclusively as waitresses, some work exclusively as entertainers, and others perform both serving and entertainment functions. The evidence establishes, however, that none of the employees serve and entertain at the same time. The two functions are kept separate, being performed in rotation. When engaged in the service of beer, the waitresses of the respondent wear either lingerie or halter tops and shorts, depending on whether they are working inside in the entertainment areas or outside on the patio. There is no entertaining done on the patio, and thus employees, when working there act strictly as waitresses. In this regard, it should be noted that while many of the employees of the respondent interchange between the two locations, some of the employees work exclusively on the patio.

12. As stated above, section 55(5) allows the Board to terminate the bargaining rights of a trade union in circumstances where the successor employer has changed the character of the business so that it is substantially different from the business of its predecessor. The Board's approach to the construction of section 55(5) has undergone some development as the labour relations implications of the section have become apparent. Initially, the Board took a rather broad view of the scope of section 55(5). In *Man of Aran Ltd.*, [1973] OLRB Rep. June 313, the first case of significance decided under section 55(5), the Board focused on the dictionary definition of the word "character" to reach the conclusion that a conversion from a general tavern to an Irish pub constituted a change sufficient to warrant section 55(5) relief. There then occurred a movement toward a less expansive interpretation of the section, and one more in keeping with the purpose of section 55 as a whole. This development can first be seen in *Robes Royale*, supra, and later, and more clearly, in *Winco-Steak'n Burger*, [1974] OLRB Rep. Nov. 788 (see also *Marvel Jewellery Limited*, supra). In *Winco*, the Board has this to say about the kind of situation for which section 55(5) was designed:

"The implementation of subsection 5 of section 55 involves the revocation of the remedial effects otherwise flowing from the provisions of section 55 of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words 'substantially different' must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate, inap-

proper or unreasonable in all the circumstances of the particular case under review."

13. In terms of labour relations, the essential difference between the operation of the Red Lion and the operation of the respondent is that whereas before entertainment was provided by persons other than the waiters, entertainment is now provided by some of the waitresses, although not while they are working in that capacity. But the respondent argued that the focus of the business at 467 Jarvis has changed from that of beer to that of entertainment. Be that as it may, the fact remains that beer is still being served. The respondent, moreover, is continuing to derive a substantial portion of its revenue from that endeavour. The Board entertains no doubt that the atmosphere at 467 Jarvis has changed considerably as a result of the introduction of burlesque. We are of the view, however, having regard to the purpose of section 55 as a whole, which is to provide some permanence to established bargaining rights, that a business does not change its character simply because its atmosphere changes from that of a regular, to that of a burlesque, pub. Before the sale of the Red Lion to the respondent, the applicant represented a unit of full-time and part-time male and female employees employed as, among other things, tapmen and beverage waiters (see paragraph 21.) The work embraced by these job classifications has survived the sale; and we have not been persuaded that the applicant cannot continue to represent the employees (be they male or female) who will be performing that way for the respondent. Certainly there is no problem as far as the tapmen are concerned. Nor is there a problem in respect of the employees who work exclusively as waitresses. Both of these employee groups fall squarely within the scope of the unit for which the applicant formerly held bargaining rights. The existence of persons who perform both service and entertainment functions has caused the Board some concern in that it may give rise to a problem with respect to the assignment of work (although, it is to be noted that the applicant is not seeking to represent any of the new employees in their capacity as entertainers or to interfere in the decision as to how much of their time is to be spent in the performance of entertainment, as opposed to serving, functions.) But this problem, if it exists, is not, in the Board's view, sufficient, by itself, to warrant the grant to the respondent of section 55(5) relief.

14. Our conclusion, then, after taking into account the considerations outlined above, is that the respondent has not established, on the balance of probabilities, that continued representation by the applicant would be inadequate, inappropriate, or unreasonable in all the circumstances of this case. Accordingly, the respondent's request for a declaration terminating the bargaining rights of the applicant is denied.

III

15. The final issue in the section 55 application is whether the Red Lion, the predecessor of the respondent, was bound by a collective agreement with the applicant at the time of the sale. If that question is answered in the affirmative, then the respondent is bound, by reason of section 55(2), to the collective agreement as if it had been a party thereto. If, on the other hand, the question is answered in the negative, then the applicant continues, by reason of section 55(3), to be the bargaining agent for the employees of the respondent in a like bargaining unit for which the applicant was the bargaining agent at the time of the sale.

16. The applicant was certified in October of 1964 for a full and part-time unit of "tapmen, bartenders, beverage waiters, barboys and improvers of the Everene Public

House", the former name of the establishment located at 467 Jarvis Street. Since that date, the applicant has had a number of collective agreements with the Red Lion. These agreements were all in short form and were all based on the master agreement between the Hotel Association of Metropolitan Toronto and the applicant.

17. The document which the applicant contends is a collective agreement binding upon the respondent is reproduced in full below:

"TO WHOM IT MAY CONCERN

The undersigned employer agrees to be bound by the new Master Agreement, now in negotiations upon ratification by the Hotel Association of Metropolitan Toronto and the International Beverage Dispensers' & Bartenders' Union, Local 280."

The document is dated January 27, 1977 and is signed by Ray Domenico, the former manager of the Red Lion, on behalf of the Red Lion Inn. There is no signature for the applicant.

18. Section 1(1)(e) of The Labour Relations Act defines a collective agreement as "...an agreement in writing between an employer...on the one hand, and a trade union...on the other hand...". The Board has held, generally, that a series of documents in writing signed by the parties is capable of constituting a collective agreement within the meaning of section 1(1)(e) (see, for example; *Marsland Engineering Limited*, [1970] OLRB Rep. Apr. 133) and, specifically, that short form agreements that incorporate, by reference, the provisions of collective agreements between the applicant and the Hotel Association of Metropolitan Toronto, will be afforded collective agreement status (see for example: *Man of Aran Ltd.*, supra). The Board, however, has never held that a document which does not contain the signatures of both the union and the employer can qualify as a collective agreement under The Labour Relations Act. (See, for example, *R.T. Construction*, [1971] OLRB Rep. Sept. 593.) To do so would be to ignore the explicit direction of the Legislature contained in section 1(1)(e).

19. As noted above, the document in question is not signed by the applicant. In the Board's view, this defect is fatal to the applicant's claim for the document of collective agreement status.

20. But counsel argued that the absence of a signature by one of the parties only becomes material if the missing signature is that of the party against whom the agreement is sought to be enforced; and, here, it is the applicant's signature which is missing and not the respondent's. The Board cannot accept this argument. While it may have remained open to the applicant (at any time prior to the sale by TN of the Red Lion to the respondent) to sign the "collective agreement", the fact remains that, at the time of the sale, there was no collective agreement in existence. The Board is unable to construe section 55(2) as binding a successor employer to a document which could have been converted by the union into a collective agreement before the sale, but was not.

21. The Board finds that the applicant continues to be the bargaining agent for the employees of the respondent in the bargaining unit described in the last collective agreement between the Red Lion and the applicant, that is, all full-time and part-time male and

female employees employed in the beverage department as tapmen, bartenders, beverage waiters, (including waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the serving of alcoholic beverages.

22. Before leaving this issue, it should perhaps be noted that the last collective agreement between the Red Lion and the applicant was signed by the applicant as well as the Red Lion.

IV

23. That brings us to the applicant's unfair labour practice complaint.

24. On the basis of the evidence before us, the Board has no difficulty in concluding that the terminations of the 5 waiters formerly employed by the Red Lion were motivated, at least in part, by anti-union considerations.

25. The uncontradicted evidence of the applicant establishes that on Friday, June 10th, the day of the sale, Jimmy Zazza, the president of the respondent, telephoned Julius Troll, the secretary-treasurer and business agent of the applicant, and informed him that he was taking over the Red Lion and would like a meeting. A meeting took place in Troll's office at 9:00 a.m., Monday, June 13th. During the course of that meeting, Zazza put his hand in his pocket and inquired "how much does it take to get the union out of here? I don't want anything to do with the union". Zazza then stated: "You're getting forty dollars a month now for five people; I'll give you sixty dollars if you'll get the hell out."

26. The uncontradicted evidence of the applicant establishes further that shortly after the meeting with Troll, Zazza held a meeting with the employees at which he indicated that he would be bringing in non-union women to serve beer and entertain in the nude, and that the male union employees would not be kept on as waiters. Zazza stated, however, at that time, that he might be able to make room for the men in some other capacity, but at the minimum wage, and not at the union rates. At this meeting with the employees, Zazza stated, among other things: that he had been to see Troll and could make no arrangement there, that he would give him two hundred dollars if it would get the union out, and that he did not want the union coming in and telling him how to run his business. At this meeting Zazza also stated – in response to a statement by one of the waiters that there were women in the union – that he wanted to pick and choose his own girls. (It should be noted here that the Master Agreement referred to in paragraph 17 contains a hiring hall provision.) At this point, Zazza stated that he would meet with the employees again that afternoon and that they should have a meeting among themselves to see if they could come up with an arrangement. After a short discussion, the waiters informed Zazza that they would be prepared to leave in return for a cash settlement of forty-five hundred dollars apiece. (The Board was informed that this figure represented the projected earnings for a waiter at the Red Lion for the summer period.) Zazza then stated that he would contact his lawyer and would get back to the men later that afternoon. At two o'clock, Zazza returned with the news that he could not pay them any money because the union would still be in and he would have to pay the union wages to someone else. On June 28th, Randell Sawatzky, Edward Gagne, Nick Kessnerovic, Eddie Trtovic and Lloyd Bonear were each given the following notice of termination:

"We wish to advise you that your services will no longer be required by Jimmy's II and, in accordance with The Employment Standards Act, Revised Statutes of Ontario, 1970 and Amendments thereto, we are giving you the required notice."

27. The Board finds that the terminations of Sawatzky, Gagne, Keserovic, Trtovic and Bonear were in violation of section 56 of The Labour Relations Act, which prohibits employer interference with the selection or administration of a trade union or the representation of employees by a trade union, section 58(a), which prohibits an employer from refusing to employ or to continue to employ a person because he was or is a member of a trade union, and sections 58(c) and 61, both of which prohibit employer intimidation or coercion designed to compel an employee to refrain from becoming, or to cease to be, a member of a trade union.

28. The Board also finds that the respondent has violated section 58(b) and section 59(1) of The Labour Relations Act by attempting to bargain with the employees directly while they were represented by the applicant and that the respondent has violated section 56 by attempting to induce Julius Troll, an official of the applicant, to withdraw union affiliation from its business.

29. The Board directs the respondent to cease forthwith its unfair labour practices and to reinstate Messrs. Sawatzky, Gagne, Keserovic, Trtovic and Bonear in their former positions as waiters with full compensation for lost wages and without loss of seniority.

30. At the hearing, the Board indicated that it might be prepared, in view of the apparent intention of the respondent to take no further part in these proceedings, to depart from its normal practice and determine the issue of compensation on the basis of affidavit evidence and without further hearing. Upon reflection, however, the Board has decided not to proceed in this fashion. Accordingly, we are now issuing our normal direction in respect of the Section 79 complaint. The Board will remain seized of the complaint in the event that the parties are unable to agree upon the amount of compensation owing to the employees the Board has ordered reinstated.

DECISION OF BOARD MEMBER N.B. SATTERFIELD

While I am in agreement with the decision of the Board that subsection 5 of section 55 should be read in the light of the purpose of section 55 as a whole, I am somewhat concerned that the standard enunciated in the *Winco* case could, if too strictly applied, make it unduly difficult for an employer to obtain section 55(5) relief. In the instant case, for example, the employer has injected an entirely new element into what was formerly primarily a beer dispensing establishment. While it is true, as my colleagues point out, that the respondent is continuing to derive a substantial portion of its revenues from the sale of beer, it would seem that entertainment, rather than beer, is the primary drawing card of the business, as it presently exists. In such a context, the existence of persons who perform both entertainment and service functions could, in my opinion, result in a situation where continued representation by the applicant would be inadequate, inappropriate or unreasonable. I do, however, agree that, on the basis of the representations and facts before the Board, the respondent has not, on the balance of probabilities, established that such a situation would likely occur.

Apart, then, from this one qualification, I concur with the decision of the Board.

0407-77-R London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant), v. **St. Raphael's Nursing Homes Limited (KITCHENER)**, (Respondent).

Certification – Bargaining Unit – Whether students and part-time employees together constitute a separate appropriate bargaining unit.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and D. B. Archer.

APPEARANCES: *Ted Wohl and Al Campbell for the applicant; Hugh J. MacLean, Arthur Schelter and Elizabeth E. Schelter for the respondent.*

DECISION OF THE BOARD; September 12, 1977.

1. This is an application for certification in respect of a unit of part-time employees and students.

2. In view of the membership strength of the applicant a representation vote was taken and the ballot box sealed pending a final determination of the bargaining unit.

3. Three issues have arisen with respect to the bargaining unit. Firstly, the respondent submits that students should not be included in the bargaining unit along with persons regularly employed for not more than 24 hours a week. Secondly, it submits that Kathleen Rzasa, classified as dietary aide, should be excluded from the unit because since the date of application she has commenced work as a full-time employee. Thirdly, it submits that Bettye Clark, a nurse's aide, should be excluded because she has moved to full-time employment temporarily since the date of application and may remain full-time permanently should an opening occur.

4. We deal firstly with the requested exclusion of students. Where an application is for a unit of part-time employees the Board has, as a general rule, taken the view that students employed during the school vacation period and employees regularly employed for not more than 24 hours per week share a sufficient community of interest to form a single bargaining unit. (See, *Chapples Stores Limited*, [1970] OLRB Rep. July 530). The Board has noted in some cases that students who are employed during the school vacation period remain employed on a part-time basis during the school term, so that the two descriptions sometimes refer to the same employees. (See, e.g. *Cara Operations Limited*, [1969] OLRB Rep. June 349; *Muskoka Board of Education* [1975] OLRB Rep. Mar. 209).

5. There is nothing in The Labour Relations Act to suggest that students as a group were intended to be deprived of the rights of collective bargaining (See, *The Victoria County Board of Education*, [1975] OLRB Rep. 529). If the respondent's request to exclude students were acceded to, not only would there be a fragmentation of the bargaining unit that would

have no sound basis in policy, but in all likelihood the access of student employees to any collective bargaining would be severely impeded. The ability of a trade union to organize and bargain on behalf of students, and the commensurate right of students to have such representation, would be virtually eliminated if certification campaigns and applications among these transient employees must be restricted to the brief time of the school vacation period.

6. In considering whether the part-time employees alone would constitute an appropriate bargaining unit the Board must also ask itself whether the resulting separate grouping of the students employed during the school vacation period would constitute an appropriate unit. That is to say would a separate unit of students be viable for collective bargaining purposes? We are satisfied that a unit comprised solely of students would be less than viable for collective bargaining purposes and that to exclude students from the unit of part-time employees would be to effectively exclude them from the benefits of The Labour Relations Act. The Board, therefore, does not in this case depart from its normal practice of defining the bargaining unit to include both persons regularly employed for not less than 24 hours per week and students employed during the school vacation period.

7. As regards the second issue, the Board sees no reason to depart from the procedure which its experience has determined to be most appropriate to determine the classification of persons regularly employed for not more than 24 hours per week. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135). In this case, according to the Labour Relations Officer's report, it is common ground that Kathleen Rzasa worked for no more than 24 hours per week for four or more of the seven weeks immediately preceding the date of this application. In that circumstance the Board determines that she is, for the purposes of this application, an employee regularly employed for not more than 24 hours per week. Similarly, we find that Bettye Clark is an employee regularly employed for not more than 24 hours per week.

8. In the result the Board directs the Registrar that the ballot box be opened and all ballots, including segregated ballots, cast pursuant to the Board's Order of August 8, 1977 be counted.

0462-77-R Ontario Haulers Union, (Applicant), v. Repac Construction & Materials Limited, (Respondent), v. A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183, (Intervener #1), v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230, (Intervener #2), v. Labourers' International Union of North America, Local 183, (Intervener #3), v. The Metropolitan Toronto Road Builders' Association, (Intervener #4).

Certification – Trade Union Status – Whether employee organization has established status – Importance of Board finding of status discussed.

BEFORE: A. L. Haladner, Vice-Chairman and Board Members D. Archer and F.D. Kean.

APPEARANCES: *J. McNamee and Angelo Natale for the applicant; S.C. Bernardo and Len Racioppa for the respondent and Intervener #4; S. Wahl, B. Teichmann, I. Raymond, C. Lacombe for Intervener #1, Intervener #2 and Intervener #3.*

DECISION OF THE BOARD; September 22, 1977.

1. This is an application for certification. The applicant, not having established its status as a trade union on any previous occasion before the Board, was advised in advance of the hearing that it must be prepared at the hearing to satisfy the Board that it was a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

2. Mr. A. Natale, the president and founder of the applicant, gave evidence relating to the formation of the applicant organization. During the course of his examination-in-chief, Mr. Natale produced a document which he testified contained the minutes of the meeting at which the applicant had been formed. Mr. Natale's evidence-in-chief was that the minutes of the founding meeting had been drawn up by himself and, further, that they had been drawn up at the meeting.

3. The document in question displays at least two different kinds of ink and, to the untrained eye of the Board, appeared as well to have been written by more than one person. When questioned about this by the respondent, Mr. Natale stated categorically that every word in the document had been written by himself and that no one else had been involved in the physical preparation of the document. His explanation for the discrepancy in ink was that he had taken the document with him to the meeting with a number of entries already written in. These entries are in the nature of procedural announcements and directives and were stated by Mr. Natale to have been made by himself the day before the meeting after consultation with a lawyer as to the procedure to be followed when forming a trade union. The Board was informed that the remaining entries on the document reflected what actually took place at the meeting, and were prepared during the meeting by Mr. Natale alone.

4. The minutes of the meeting indicate that a secretary, one Dino Mondelli, was elected to keep minutes of the meeting. Mr. Natale testified, however, that he kept the notes himself, rather than Mr. Mondelli, because of his greater facility with the English language.

5. Mr. Natale told the Board that there were, in addition to himself, seven employees present at the meeting at which the applicant was founded. Mr. Natale, however, was the only witness called by the applicant to give evidence as to what took place at that hearing.

6. Not being satisfied with the witness's explanation of the preparation of the purported minutes of meeting, counsel for the respondent called Mr. Royston Packard, a forensic examiner, to give evidence before the Board. Mr. Packard, an individual whose qualifications as an expert in the field of handwriting identification are beyond dispute, testified that three different writing instruments had been used in the preparation of the document in question. He testified further that while it was possible that the document had been prepared by one person, the primary indication from the document was that it had been produced by two or more different hands.

7. This is not the first occasion that an organization, of which Mr. Natale is president and founder, has applied to the Board for trade union status. In *Repac Construction & Materials Limited*, [1976] OLRB Rep. Oct. 610, an organization known as "Ontario Haulers Association Inc." applied for certification without previously having established its status as a trade union. The circumstances surrounding that application are set out in the following excerpts from the Board's decision:

- “4. For the applicant, Mr. A. Natale, its president, gave evidence relating to the formation and evolution of the applicant organization. During the course of examination-in-chief, the Board's attention was drawn to the fact that Natale was referring to a certain document while giving his testimony. The witness's explanation of this document left the Board with the firm impression that the document consisted of all the minutes of the applicant's meetings, and that these minutes had been written out at the meeting by the witness. Given the relevance of this document to the issue of the applicant's status, the Board ordered that this document be admitted into evidence as an exhibit.
5. At the close of examination-in-chief of Natale, counsel for the intervener trade union requested the Board to permit an examination of this exhibit by Mr. Royston Packard, a forensic examiner. The Board adjourned to consider this request. Immediately after the hearing was reconvened, counsel for the applicant made a statement to the Board. The gist of the statement was that the document purporting to be the minutes of the meeting had been written out by Natale just a few days prior to the hearing, being prepared from minutes made by Natale and another person at the time that the meetings were held. Counsel for the applicant stated that there had been no intention to mislead the Board, apologized to the Board, and sought leave to withdraw the applications.

8. In rejecting the applicant's request to withdraw, the Board, in *Repac* (supra) stated:

6. ...If the applicant had proceeded with these cases and the Board had discovered that it had been misled (as would be likely), it would have been difficult for the Board to make a finding of status on the evidence before it, and the applications probably would have been dismissed. In view of this consideration, we do not consider it appropriate merely to allow the applicant to withdraw the applications. The two applications, therefore, are dismissed."

9. The grant of trade union status to an applicant entitles it to negotiate and enter into collective agreements, and to otherwise exercise the powers granted to it under The Labour Relations Act. As indicated at the outset, the onus rests upon the applicant to prove its status if such status has not previously been established before the Board. In order to establish its status as a trade union, an applicant must satisfy the Board that it is a viable entity for collective bargaining purposes; and, in this regard, the Board requires that *vive voce* evidence be given of the circumstances surrounding the formation of the union. Needless to say, the Board must be satisfied that the applicant's account of those circumstances is a true one.

10. The Board, having regard to the *prima facie* appearance of the document alleged to contain the minutes of the applicant's founding meeting, to the expert evidence of Mr. Packard, to the fact that Mr. Natale was the only witness called to give evidence for the applicant, and to the demeanour of the witness on the stand as well as his evidence as a whole, is not satisfied that Mr. Natale's account for the circumstances surrounding the formation of the applicant can be given credence. Accordingly, we are unable to conclude that the organization which Mr. Natale claims to have founded is a trade union within the meaning of The Labour Relations Act.

11. This application for certification is, therefore, dismissed.

0635-77-U International Beverage and Dispensers Bartenders Union Local 280, (Complainant), v. *New Gregory House*, (Respondent).

Section 79 – Arbitration – Whether employer unilaterally altered terms of employment contrary to section 70 of the Act – Whether Board will defer to arbitration – Whether monies owing should be paid to employees directly or to union in trust for them.

BEFORE: G. Gail Brent, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: B. Symes and J. Troll for the complainant; Moishe Nahum for the respondent.

DECISION OF G. GAIL BRENT, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL: September 28, 1977.

1. This is a complaint under section 79 of the Act that the respondent has dealt with

all of the employees in the bargaining unit contrary to the provisions of sections 14, 42, 58(a)(b)(c), 59(1), 62, and 70(1) of The Labour Relations Act.

2. Before dealing with these matters in substance there are some preliminary points to deal with. At the time of the first day of hearing on July 28, 1977, the parties agreed to adjourn the section 14 complaint sine die on the respondent's agreement to enter into the conciliation process with the complainant. Prior to the commencement of the second day of hearing, the respondent requested an adjournment as Mr. Nahum had retained counsel in the interim and counsel was unable to attend at the Board that day. The complainant union refused to consent to the adjournment and asked the Board to follow its usual practice of not granting adjournments except under exceptional circumstances. The Board denied the request for the adjournment.

3. The essence of the complaint in this matter is that the respondent unilaterally altered the terms and conditions of employment contained in the expired collective agreement contrary to section 70 of the Act. Specifically it is alleged, and the respondent admits, that the wage rates lower than those in the collective agreement were paid and the obligation to pay the four-hour minimum guarantee was not honoured.

4. The complainant had a master collective agreement with the Hotel Association of Metropolitan Toronto which expired on October 31, 1976. On July 9, 1975 the respondent agreed in writing to be bound by "all the terms and conditions entered into by the Hotel Association of Metropolitan Toronto" and the complainant and contained in the above-mentioned master agreement which was then in effect. Representatives of the complainant and respondent both signed their agreement. The master agreement in question contained several schedules which, by virtue of Article 19, formed part of the agreement and which directly relate to the matter before us. In particular, Schedules B and C, which set out job titles and descriptions and rates of pay respectively must be examined and are set out in full below:

SCHEDULE B

JOB TITLES AND DESCRIPTIONS

(a) *Tapman* Under the supervision of manager and/or assistant manager, may be required to control stock, handle cash, connect casks to pumps, fill orders, maintain order and discipline in the room he is in and, in the absence of the manager and/or assistant manager, to enforce observance of all the regulations of the Liquor Licence Board as they pertain to his duties and the duties of those under him.

(b) *Waiter* Under the supervision of the manager and/or assistant manager, tapman or head bartender may be required to perform the following duties: Take verbal instructions re arrangements of tables and chairs in the room and shall be assigned to a specific station; take orders from customers and attend to same, making all necessary cash transactions with the Tapman, Bartender, Cashier and the customer; take care of the cleanliness of his working area, particularly the tables and ashtrays during his working hours and perform related duties as required. Waiters shall not be required to sweep or mop floors or to pile or set chairs, subject to the fact that waiters shall be required to maintain clean and orderly work areas during sale hours. Waiters will also be responsible to observe and assist in the

observance of all the regulations of the Liquor Licence Board. Waiters may also be required to operate automatic beer dispensing equipment or other automatic dispensing equipment in which event they shall be re-classified and paid in accordance with Schedule C.

(c) *Composite Job* Where a waiter is required to exercise tapman or bartender's duties, he shall receive the waiter's or tapman's or bartender's rates of wages for the amount of hours worked on each job respectively.

(d) *Bartenders (Stool and Service)* Under the supervision of manager, assistant manager or head bartender, may be required to control stock, handle cash, service customers, waiters or waitresses and attend to same making all necessary cash transactions; be responsible for the cleanliness and administration of his Bar during his working hours and perform related duties as required; be responsible to observe and assist in the observance of all regulations of the Liquor Licence Board. If a bartender is required to work more than twenty hours on the Service Bar in any one week, he shall receive the regular rates of wages as a Service Bartender.

(e) *Composite Stool and Service Bartender* Where a bartender is required to service both waiters and a Stool Bar at the same time he shall be paid according to the rates set out in Schedule C for all hours so worked.

(f) *Bar-Boys or Improvers* Under the supervision of manager, assistant manager, head bartender, is required to assist generally behind the Bar and be responsible for cleanliness of same. Duties may include the stocking of all supplies, washing and polishing of glasses and will also include actual serving of patrons and waiters or waitresses only under the constant control and supervision of qualified bartender. It is understood and agreed that a bar-boy and/or an improver may assume full responsibility of a Bar only in an emergency. In all other instances, he shall receive regular bartender's rates.

SCHEDULE C

RATES OF PAY

Full Time Rates for All Employees required to work over 36 hours per week	Effective	Effective
Service Bartender	Nov. 1/74 \$ 157.00	Nov. 1/75 \$ 173.00
Stool Bartender or Beerex	134.00	147.00
Composite Bartender	145.50	160.00
Waiter	112.00	124.00
Improvers	112.00	124.00
Tapmen	157.00	173.00
Bar Boys (Starting Rate)	106.00	118.00
Bar Boys (After completing 75 working days in service)	112.00	124.00

**Spare Rates to Apply to All
Employees Working 36 Hours or
Less Per Week**

Service Bartenders –			
Min. Guarantee of –	\$ 4.00 per hr	\$ 4.40 per hr.	
for 4 hrs. or less	16.00	17.60	
Stool Bartender or Beerex –			
Min. Guarantee of –	3.43	3.75	
for 4 hrs. or less	13.72	15.00	
Composite Bartenders –			
Min. Guarantee of –	3.72	4.08	
for 4 hrs. or less	14.88	16.32	
Waiters –			
Min. Guarantee of –	2.87	3.18	
for 4 hrs. or less	11.48	12.72	
Tapmen –			
Min. Guarantee of –	4.00	4.40	
for 4 hrs. or less	16.00	17.60	

The foregoing wage schedule sets out the minimum to be paid. Any employee who, at the time of the signing of this Agreement, is receiving a wage higher than the wage set out above for his classification shall suffer no reduction in wages because of the signing of this Agreement.

The wage schedule above is retroactive to November 1st, 1974, applicable to employees covered by this Agreement on the date of its execution who work regularly sixteen hours per week or more as of November 1st, 1974, who have left that place of employment and at the date of execution of this Agreement are employed elsewhere in the industry or are actively looking for work in the industry and are registered with the Union for this purpose.

The only term of the Collective Agreement which is retroactive back to November 1st, 1974, is the wage schedule, outlined above, and it shall be applied on this retroactive basis to all employees who on the date of execution of this Agreement are on the payroll of an Employer and who work regularly sixteen hours or more per week, or who were on the payroll of an Employer on and after November 1st, 1974, and worked regularly for sixteen hours or more per week for a period of two weeks or more, subject also to the condition outlined above.

5. Mr. Troll, the Secretary Treasurer and Business Agent of the complainant union testified that in October, 1976, in the last month of the master agreement, he gave notice to bargain to the respondent but that he has heard nothing from the respondent since. He further testified that they have gone to conciliation and there has been no "no board" report. Mr. Troll was not challenged or contradicted on these points. Further, there is no evidence that the complainant's right to represent the employees has been terminated in accordance with the provisions of the Act, or that the complainant consented to any alteration of the agreement.

6. Given the admission of the respondent that the provisions of Schedule C of the collective agreement were ignored, and the evidence of Mr. Troll, there would appear to be

no alternative but to find that the respondent has not complied with section 70(1) of The Labour Relations Act.

7. In reaching this finding, we agree with counsel for the Union that this is the sort of case where the Board ought to assert jurisdiction rather than give way to arbitration. This is the sort of situation where there are implications which go beyond the collective agreement between the parties. The Board has heard evidence, none of which has been substantially challenged or contradicted, which leads us to find that the respondent has wrongly informed new employees that they have a choice of joining the Union or not; that the respondent has consistently given employees a negative picture of the effects of Union membership; that the respondent has engaged in the practice of having at least some new employees work for no wages immediately after being hired; that the respondent has paid employees \$2.65 an hour during training periods which appear to be non-existent and which are not provided for in the agreement; and that the respondent has followed a practice of entering into individual contracts of employment with employees to work for less than the Union rate. These facts are such that we must find that we are faced with a very serious and fundamental breach of the rights and freedoms protected by *The Labour Relations Act*. It would seem then that the respondent has so ignored its obligations and responsibilities as to strike at the heart of the relationship between it and the Union. Although this is a situation which on the facts is not similar to that in *United Chemical Workers, Local 159, v. Kodak Canada Ltd.*, [1977] OLRB Rep. 49 it does raise issues which go to the very heart of the collective bargaining structure set out in the Act.

8. The only matters which must be resolved then are those relating to the appropriate remedies which should be given in this case. The complainant has asked that the Board do the following:

- (a) order that the shortfall in wages be paid the members of the bargaining unit and that this money be paid to the complainant or its solicitor in trust for the employees concerned;
- (b) order that the respondent observe the rates of pay in Schedule C;
- (c) order that the respondent cease and desist from the practices of (1) not paying the correct rate, (2) not honouring the four-hour minimum guarantee, and (3) intimidating or coercing employees into agreeing to work for less than the minimum rate in the collective agreement.

The complainant also requested that the Board order that any order it makes be posted on the premises of the respondent for all of the employees to see. These submissions will be dealt with in order.

9. The Board heard direct evidence from Susan Ballantyne, Nancy Hoosen, Joyce Robar, Rita Lianga and Lisbett Christensen as to their duties and rates of pay. Evidence was also heard from Patricia Patterson, the respondent's bookkeeper, who kept the payroll records as to the instructions she was given regarding the amount to be paid each employee and the number of hours for which to pay the employees. Her evidence was that she was told to disregard the collective agreement rate and the four-hour minimum. Ms. Patterson

also testified as to the duties of the other members of the bargaining unit on whose behalf the complaint is made. While Ms. Patterson did not work in the various bars or dining room in the respondent's establishment, she did take instructions, in her official capacity, from the management as to the classification of each of the employees, and her evidence on that point was not challenged on cross-examination. Therefore, we accept the evidence of the employees and Ms. Patterson as to the duties and classifications of the members of the bargaining unit.

10. We have been asked by the complainant to award a definite amount to each of the individuals and to this end we have been provided with the payroll records of the respondent for the pay period ending November 6, 1976, to the period ending July 8, 1977. It is therefore possible, using these records, Schedule C of the collective agreement, and the evidence before us to assess the amounts owing during this period. These are as follows:

Ballantyne, Susan D. (bartender)	\$196.79
Florence, Laura (waitress)	23.58
Futus, Dianne (bartender)	26.76
Grotsky, Judy (bartender)	6.75
Hodgson, Laura (waitress)	39.75
Hoosen, Nancy (waitress)	189.75
Liang, Rita (waitress)	45.58
Lightfoot, Ruth (waitress)	12.33
Middleton, Janet (waitress)	5.58
Robar, Joyce (bartender)	273.29
Slater, Jill (waitress)	13.32
St. John, Beverley (waitress)	8.55
Terry, Charlene (bartender)	217.10
Zelena, Mary Ann (waitress)	11.61
TOTAL	\$1,070.74

11. Counsel has asked that for ease of administration we make the total amount payable to the Union in trust or to the law firm representing the Union in trust. It is argued that there may be some difficulty locating some of the people and the Union or its solicitor is best able to handle this problem and that in the event that any difficulty arises in the enforcement of this order the creation of a trust simplifies the task.

12. The creation of a trust is an unusual step and counsel could point to no case where the Board has chosen such a course of action. The only case to which we were definitely referred was *Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975), 8 OR (2d) 103(C.A.) where a Board of Arbitration made an award to the Union in trust for the benefit of those of its members who had been harmed by the violation of the collective agreement. Upon considering the *Blouin Drywall Case* (*supra*) it appears that there are two significant provisions in that collective agreement which account for that action. The first is Article 8.09 which provides that:

“All monetary settlements either at the grievance or arbitration level shall be forwarded to the Local Union for distribution to the affected Parties.”

The second is Article 11.02(d) which establishes a “Vacation Pay Trust Fund” to which the employer was obliged to contribute. Therefore it would seem that the award in *Blouin Drywall* can be explained in terms of the specific provisions of that collective agreement and does not exhibit any particular trend toward the establishment of trust funds.

13. While there may be some reason for apprehension that the respondent might ignore the order of the Board, it would seem that it ought to be given the opportunity to comply and that if further enforcement is needed the creation of a trust would not necessarily assist in that enforcement. In order to depart so drastically from its normal practice in such cases, the Board would need very pressing reasons to create the trust; these reasons were not given here. Therefore there will be no trust created in favour of the employees concerned.

14. For all of the reasons given above and in view of the evidence before us we order the following:

- (1) That the Employer pay to those employees listed in paragraph 10 (*supra*) the amounts shown beside their names to make up the proven shortfalls for the pay period ending July 8, 1977.
- (2) That the Employer cease and desist from practices of
 - (a) not paying the correct rate according to the collective agreement;
 - (b) not observing the provisions of the collective agreement relating to the 4-hour minimum;during the freeze period established in section 70 of the Act.
- (3) That the Employer cease and desist from any practice which may coerce the employees not to enforce their rights under the collective agreement during the period defined in section 70 of the Act.
- (4) That the Employer abide by the provisions of the collective agreement in relation to wages, any other term or condition of employment, and any right, privilege, or duty of the employer, Union, or employees during the period defined in section 70 of the Act.

DECISION OF BOARD MEMBER O. HODGES:

1. I concur with my colleagues in the findings stated in paras. 6 and 7 of this unanimous decision of this panel of the Board, and in the award as to quantum.
 2. I further find that the monies awarded be directed into a trust in the name of the applicant trade union for disbursement to the affected employees, as argued by counsel for the applicant. It is eminently reasonable that employees be relieved of the possibility of further harassment by the respondent employer through the process of payment, in accord with the order of the Board.
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0718-77-M The Lennox and Addington County Board, (Employer), v. Canadian Union of Public Employees and its Local 1558, (Trade Union).

Reference – Collective Agreement – Whether following an A.I.B. rollback the collective agreement continues to exist.

BEFORE: G. Gail Brent, Vice-Chairman and Board members A. Hershkovitz and R. Redford.

APPEARANCES: K.W. Kort, T.K. Veenstra and G.A. Hannah for the employer; J. Ed Scott and Sidney Binks for the trade union.

DECISION OF THE BOARD: September 22, 1977.

1. The Minister has referred to the Board, pursuant to section 96 of the Act, the question as to whether the Minister has authority under The Labour Relations Act to appoint a conciliation officer.
2. The parties have agreed upon certain facts and these are as follows:
 - (a) The Union filed notice to bargain with the Board of Education on October 4, 1976. The first meeting was on November 1, 1976 and they bargained for several meetings.
 - (b) The Union filed a request for conciliation on January 28, 1977.
 - (c) The meeting set for March 3, 1977 with the conciliation officer did not take place and the conciliation officer reported by letter dated May 2, 1977 that the differences between the parties had been resolved (File No. 76-2037).
 - (d) Prior to March 3, 1977 the parties entered into a tentative memorandum of settlement which was subsequently ratified by both parties and resulted in the purported collective agreement (Exhibit 1) which was signed on March 3, 1977. The purported agreement covered the period January 1 – December 31, 1977.

- (e) On March 16, 1977 the Board of Education submitted the necessary forms and letters (Exhibit 2) to the Anti-Inflation Board for approval of the monetary package contained in the purported agreement.
- (f) On May 26, 1977 the Union also wrote to the Anti-Inflation Board (Exhibit 3).
- (g) During the period March 16 – June 20, 1977 both Mr. Veenstra, the Business Administrator of the Board of Education, and the Union had numerous telephone conversations with the Anti-Inflation Board. During this period the Anti-Inflation Board was supplied with additional data on comparative wage rates (Exhibit 4).
- (h) On June 20, 1977 both the Board of Education and the Union were notified by letters (Exhibits 5 and 6) that the Anti-Inflation Board viewed the increases as excessive and that it was "of the opinion that the increases should not exceed 6%." The Board of Education was directed to report "implementation of this decision within 30 calendar days", and the parties were advised that the Anti-Inflation Board assumed that the parties would modify its agreement through the collective bargaining process.
- (i) The purported collective agreement was fully implemented retroactive to January 1, 1977.
- (j) The Union applied for conciliation on July 14, 1977.
- (k) As of August 1, 1977 the Board of Education instituted a pay reduction to comply with the Anti-Inflation Board's letter of June 20, 1977.

3. The Board also heard *viva voce* evidence in this matter mostly concerning events which occurred after the June 20th notification. It appears from the evidence that after June 20th Mr. Veenstra and Mr. Scott, the Union representative, discussed several alternative ways to implement the rollback.

4. The Union applied for conciliation on July 14, 1977, and subsequent to that the parties met on or about July 26, 1977 to discuss the matter of the Anti-Inflation Board rollback. We accept that as a result of both the previous discussions and that meeting the parties agreed upon the manner in which the rollback would be implemented on condition that the amount saved by the Board of Education as a result would be applied to upgrading the salaries of those members of the Union's sister local who were employed as secretarial and clerical help by the Board of Education. This was not reduced to writing or signed by the officials of both parties, but it appears to have been the understanding of both Mr. Veenstra and Mr. Scott that the settlements were related as shown by letters they wrote both before and after the meeting. In the first of these letters Mr. Veenstra wrote to the Anti-Inflation Board on July 22, 1977 as follows (Exhibit 10):

Because of a labour dispute with another C.U.P.E. Local of this Board, we have been unable to formally modify this collective agreement and thus are unable at this time to supply you with a copy of the amended collective agreement duly signed by both parties. This will be forwarded to you as soon as possible after agreement has been reached

On July 28, 1977 Mr. Scott wrote to Mr. Veenstra (Exhibit 7) and said in part:

Regarding Local 1558, Caretakers and Maintenance – I would ask that you draft an amended wage schedule in accordance with our discussions with the A.I.B. rollback.

Regarding the Secretaries I would ask that you draft a complete collective agreement as to your interpretation of the settlement.

I realize that you must forward the tentative settlements to the Trustees.

5. On August 15, 1977 the Board of Education rejected the settlement reached with the secretaries' local. According to Mr. Veenstra the Trustees were not presented with the arrangement reached with the caretakers' local. Mr. Veenstra has not received any notice that the Union ratified the arrangement reached concerning the rollback.

6. On or about August 22, 1977 the members of the Union were sent a letter (Exhibit 8) which was dated August 11, 1977 and was under Mr. Veenstra's signature. That letter set out the revised wage rates to comply with the rollback and contained the following statements:

"After consultation with the Union, the attached Revised Wage Rates have been *tentatively* agreed upon. As the A.I.B. has stipulated that all excess payments from January to July, 1977 must be recovered, the *tentative* rates were implemented on the first of August....." (emphasis added)

7. The Board is in this case again faced with the problem of how to reconcile the Anti-Inflation legislation with the collective bargaining structure. In this case it is argued by the Board of Education that there is a valid collective agreement in effect between the parties and that the decision of this Board in *Croven Limited v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1090*, [1977] OLRB Rep. March 162 is wrongly decided or that if it applies here at all, it cannot apply until the Board of Education put itself in a position of compliance with the A.I.B. rollback (August 1, 1977).

8. The argument against the *Croven* case is based on an analysis of the powers and duties of the Anti-Inflation Board. Counsel stressed that the A.I.B. only possesses the power to recommend rollbacks and therefore it would be illogical to suggest that its recommendation could destroy a collective agreement. This argument would have a great deal of merit if one could freely choose to accept or reject this recommendation without any legal consequences flowing from the choice. While there are various levels of decision making under the Anti-Inflation Act it cannot seriously be suggested that the decision to comply with a low level recommendation rather than seek a higher level order would have any different effect on the original collective agreement between the parties. In short this Board agrees with the reasoning in the *Croven* case and will apply *Croven* to the case at hand.

9. Here as in *Croven* the Anti-Inflation Board has found the increase excessive and thrown the matter back to the parties to determine the matter of implementation. Here as in *Croven* we find that the most practical decision from the collective bargaining point of view is to decide that the ruling of the A.I.B. has "undermined the existence. . . of a collective agreement."

10. There is evidence here that the parties had discussions subsequent to the rollback in order to try to reach agreement. This would seem to reinforce the view that the parties viewed the rollback as necessitating a return to the bargaining table. It is also clear that towards the end of July they were *ad idem* about the means of implementing the rollback. There are, however, at least two basic problems with that agreement which make it impossible for us to find that the parties entered into a collective agreement as a result of the July negotiations. In the first place their agreement was never reduced to writing and signed by the parties, therefore it is not a collective agreement within the meaning of section 1(1)(e) of the Act, and in the second place it appears from the evidence that both parties regarded their agreement as conditional (or at least tentative) and either the condition has not occurred or there is no evidence to show that the agreement went beyond the tentative stage.

11. It is therefore our conclusion that there is no collective agreement between the parties and that the Minister has authority under the Labour Relations Act to appoint a conciliation officer.

0278-77-R, 0573-77-U, 0574-77-U International Brotherhood of Electrical Workers, Local Union 105, (Applicant), v. **K.W.E. Incorporated**, (Respondent), v. Employee (Objector); and International Brotherhood of Electrical Workers, Local Union 105, (Applicant), v. **K.W.E. Incorporated** and Frank Tottle, (Respondents),

Certification – Section 79 – Whether employer conduct constitutes unfair practice – Whether certification pursuant to section 7a should be granted.

BEFORE: Donald D. Carter, Chairman, and Board Members D.B. Archer and F.W. Murray.

APPEARANCES: *S.B.D. Wahl and J. Jolliffe for the applicant; G. Grossman, W. Lawrence and F. Tottle for the respondents; no one appearing for the employee.*

DECISION OF THE BOARD: September 9, 1977.

1. These matters consist of an application for certification (coupled with a request to the Board to exercise its power under section 7a of the *Labour Relations Act* in the event that the applicant is not certified without a vote under section 7), a complaint filed under section 79 of the *Labour Relations Act* alleging that the respondent has violated sections 3, 56, 58 (a), (b), (c), 61 and 70(2) of the Act, and an application for consent to prosecute under section 90 of the *Labour Relations Act*. The parties agreed that these matters could be consolidated for the purpose of receiving evidence, but that the Board would take into account the different burdens of proof when making its findings of fact.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.

3. The Board further finds that this is an application for certification under section 108 of the *Labour Relations Act*.

4. The applicant and the respondent are in agreement as to the description of the bargaining unit. The Board, having regard to this agreement, finds that all electricians, electricians' apprentices and helpers employed by the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. The parties disagreed, however, as to who fell within the bargaining unit description. A Labour Relations Officer was appointed by the Board to inquire into and report to the Board upon the nature of the work performed, on the date of the application, by those persons alleged to be affected by the application. On August 18, 1977, a hearing was held for the purpose, among others, of hearing representations relating to the report of the Labour Relations Officer. At that hearing, the parties narrowed the scope of their disagreement to the question of whether Mr. Ron Furlong had been working within Board Area 4 on the date of the application. The Board, having considered the report of the Labour Relations Officer and the representations of counsel, finds that Furlong was employed by the

respondent in Board Area 4 on May 10, 1977, the date of the application. Although the Board recognizes that the evidence relating to this issue might have been more complete, we nevertheless consider that the evidence is sufficient to ground our finding on this matter.

6. The Board, having resolved the actual composition of the bargaining unit, is not satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of the trade union on May 19, 1977, the terminal date fixed for the application and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the Act. Accordingly, there is no basis for the exercise of the Board's discretion to certify without a vote under section 7 of the Act.

7. The applicant, however, has requested certification under section 7a of the *Labour Relations Act*. This particular route to certification, and its limitations, have already been described in *Winson Construction Limited*, [1976] OLRB Rep. Nov. 714. The Board, at p. 716, stated:

The effect of applying section 7a is to take an application out of the normal certification procedures. While the full scope of this section has yet to be determined, it appears that its application may result in a union being certified automatically even though its membership position is such that it would normally be required to win a representation vote before it could be certified. However, before such an event could occur three prerequisites would have to be satisfied. These are firstly that the employer has contravened the Act, secondly that the contravention has resulted in a situation where the true wishes of the employees are not likely to be ascertained from the results of the representation vote, and thirdly that the union has, in the opinion of the Board, membership support adequate for the purposes of collective bargaining.

8. A review of the evidence is required in order to determine whether this is an appropriate case for the Board to apply section 7a. There is no question that one employee was laid off and another transferred following the filing of the application for certification. Such employer actions, however, cannot be viewed in isolation but must be characterized by reference to the totality of the employer's conduct. The evidence reveals that Frank Tottle (a part-owner of the respondent company), upon receiving notice of the application for certification from the Board, went to the location where two of the employees, Ken McNiven and Thomas Mulrain, were working to show them the Board's notice to employees. Apparently, he told the two employees to read the notice, and he indicated that he would be prepared to answer questions. When a question was asked concerning the procedure for submitting employee objections, Tottle pointed out that section of the notice form describing the procedure to be followed by employees desiring to make representations. Mulrain, in his testimony, indicated that Tottle did not do or say anything that might be construed as encouraging the submission of statements of desire. Later in that same week, Tottle was approached by another employee, Dean Braund, and was questioned about the application. Tottle indicated to Braund that he could answer questions, but that he could not influence him in any way. When Braund questioned Tottle about filing an objection, Tottle told him that he could write to the labour board.

9. The application for certification, as is not unusual, created a certain amount of controversy among the employees themselves. Glenn Neate, an employee, made his opposition to the application known to his fellow employee McNiven, pointing out that the application was likely to cost Tottle a lot of money. Braund, who was present at the same conversation, also indicated that Tottle was likely to close the business if they went union. Tottle then entered the area where the employees were speaking, and McNiven expressed his concern about the cost to Tottle. Tottle's reply was, "It's about time that you realized it." The only other occasion when Tottle expressed his views about the application occurred some time later in a conversation with Mulrain. Mulrain, who had approached Tottle about a different matter, asked him about the union. According to Mulrain, Tottle indicated that the union was messing up his business and that it might be better to fold the company's operation in Brantford and to operate on his own.

10. The lay-off and transfer of the two employees occurred a considerable time after the filing of the certification application. Mulrain, who had been assigned to the service vehicle in Brantford, was transferred to work in the Cambridge area on May 30th. The evidence indicates that Mulrain has been working steadily for the company in the Cambridge area, has been reimbursed for part of his additional travelling costs, but has not been paid for the extra time required to travel back and forth to his work. There is also evidence that the respondent refused to pay him overtime for the time spent removing his tools from the service truck before turning it over to the respondent. Tottle testified that there was a sharp decline in the work available in the Brantford area, that Mulrain had indicated a desire to get out of the service work because of his distaste for paperwork, and that the other journeyman in the Brantford area, although less senior, was involved in the respondent's one ongoing job in that area.

11. On June 17th, McNiven was laid off by the respondent. The lay-off was triggered by McNiven's request for time off for vacation, which was made at a time when there was little work available for the respondent. Tottle testified that McNiven was invited to contact the respondent upon his return from vacation, but that he heard nothing further from McNiven. As well, Tottle testified that McNiven's work performance had not been entirely satisfactory.

12. Can these incidents be characterized as amounting to contraventions of the *Labour Relations Act* by the respondent? Having carefully examined the evidence, and having assessed the credibility of the witnesses, we think not. The evidence clearly indicates that the respondent reacted in a most circumspect manner to the application for certification. Except for showing the notice to his employees, the respondent had assumed a "hands-off" approach to the application. The later remark about closing the business, although it might constitute in different circumstances an unlawful threat, in this case simply amounted to a response to an unsolicited query from one of his employees, putting it within the "free speech" qualification found in section 56. Moreover, there is no evidence that the respondent encouraged the opposition of the application by certain employees. Our conclusion, based on the evidence before us, is that there has been no violation of section 56. Moreover, there is no evidence that the respondent encouraged the opposition of the application by certain employees. Our conclusion, based on the evidence before us, is that there has been no violation of section 56 of the *Labour Relations Act*.

13. Nor do we see in the treatment of McNiven and Mulrain any violation of section

58 of the Act. The respondent, in our view, has established that the lay-off and transfer were not motivated by anti-union animus. In McNiven's case, the respondent's motive was triggered by the employee's request, and clearly justified by the proven lack of available work. Mulrain's transfer also appeared to be the responsible way to deal with the shortage of work in Brantford, especially in view of Mulrain's stated dislike of the service work. Finally, the failure to pay Mulrain overtime for time spent removing his tools from the truck, in our view, resulted only from a *bona fide* disagreement over his entitlement to such payment.

14. There remains the allegation that Mulrain's transfer constituted a violation of section 70(2) of the Act. It was argued that this transfer altered terms and conditions of employment in two ways. First, Mulrain was not being paid for any travel time exceeding thirty minutes, and, second, he was not receiving complete reimbursement for travelling expenses. Dealing with the first argument, we do not consider that the evidence establishes any prevailing practice of the respondent paying for travel time in excess of thirty minutes. Accordingly the failure to pay travel time cannot be regarded as a violation of section 70(2) of the Act. As for the second argument, although it is clear that the respondent paid all the running expenses of the truck, we consider that this arrangement was one relating only to the particular job. It was not established, therefore, that complete reimbursement of travelling costs was a general practice prevailing prior to the application. We find, therefore, that there has been no violation of section 70(2) in this regard.

15. Our review of the evidence indicates that there has been no violation of the Act by the respondent. Accordingly, the request under section 7a, the complaint under section 79, and the application for consent to prosecute are dismissed.

16. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 10, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

18. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

19. The matter is referred to the Registrar.

0569-77-R Canadian Paperworkers Union, (Applicant), v. **Kimberly-Clark of Canada Limited**, (Respondent), v. International Chemical Workers' Union, Local 813, (Intervener #1), v. International Chemical Workers' Union, (Intervener #2).

Certification – Prehearing Vote – Representation Vote – Charges – Whether electioneering during silent period sufficiently serious that vote must be set aside and new vote ordered.

BEFORE: M. G. Picher, Vice-Chairman and Board Members M. J. Fenwick and J. D. Bell.

APPEARANCES: *L. A. MacLean and G. D. Buccella for the applicant; Barry Thomas and Alan N. Chisholm for the respondent; Alick Ryder for the interveners.*

DECISION OF THE BOARD; September 23, 1977.

1. This is an application for certification in which a pre-hearing vote was taken.
2. The applicant seeks to displace bargaining rights previously held by intervener #1 and on the taking of the vote, on August 4, 1976, employees were asked to indicate whether they wish to be represented by the applicant or the incumbent International Chemical Workers' Union, Local 813.
3. The incumbent union, which was unsuccessful, has asked the Board to set aside the vote. It bases its request on certain irregularities on the day of the vote which it submits are breaches of the Board's direction prohibiting all interested persons from engaging in electioneering and propaganda from midnight of July 30, 1977 until the vote was completed.
4. The Board finds, on the basis of the evidence adduced, that breaches of the "silent period" did occur on the day of the vote. We accept the evidence of Donald MacDonald, a representative of the incumbent union. He acted as that union's scrutineer on the day of the vote, stationed at the single polling place, which was located in the conference room of the employer's plant.
5. During the course of the day Mr. MacDonald observed approximately 10 employees wearing buttons in support of the applicant union as they came to vote. The buttons are round, about 4.5 centimeters in diameter and bear the applicant's insignia surrounded by the words "VOTE C.P.U." in bold lettering. After observing about 6 such buttons during the first hour of balloting, Mr. MacDonald registered an objection with the Board's returning officer. When the next four or so employees wearing buttons presented themselves to vote they were requested by the returning officer to remove them and they did so.
6. Mr. MacDonald testified that several employees also wore decals in favour of the applicant on the brims of their working hats. The exact number of persons wearing decals is not clear but the testimony would indicate that there were fewer decals in evidence than buttons and several employees wore both decals and buttons. In other words, roughly ten to fifteen employees wore some form of indication of support for the applicant. A protest was also made by Mr. MacDonald with respect to the decals and when the returning officer requested the offending employees to remove them they complied.

7. One further irregularity occurred. The sample ballot posted by the Board at the doorway to the voting place was defaced by some unknown person during the course of the day. An X was written on the ballot in the space next to the applicant's name. It cannot be determined when the defacement occurred, but Mr. MacDonald first noticed it at approximately 2:30 in the afternoon, that being the first time he looked at the sample ballot.

8. There can be little doubt that the Board's prohibition on electioneering immediately prior to and during the vote was not universally observed. However, that finding alone does not dispose of the case. As the Board noted in *Automatic Electric (Canada) Ltd.*, 62 CLLC ¶16,226, the no-propaganda rule is not an absolute prohibition in the sense that any infraction must automatically result in an invalidation of the vote. The Board views the rule that prohibits propaganda and electioneering during the 72-hour period immediately preceding the vote as a strict rule which imposes a heavy onus on the parties to see that it is observed (*Canadian Gypsum Co. Ltd.*, [1960] OLRB Rep. Jan.349).

9. Obviously, it would unduly prejudice the parties to a representation vote if the vote could always be automatically invalidated by virtue of breaches of the silent period by persons whose conduct is beyond the parties' reasonable control. Having found a disregard of the silent period the Board therefore must ask whether the party concerned took reasonable precautions to avoid or prevent any breach. If it is satisfied that the party has exercised the necessary care and that the breaches are neither so serious nor so widespread as to call into question the results of the vote, the Board will allow the vote to stand. Where it is found that isolated infractions are the work of rank and file employees who are not under the control of the union and that the union did all that can be reasonably expected to prevent those breaches, the Board may decide not to disturb the vote. (*Rheem Canada Limited*, [1965] OLRB Rep. July 284; *Marsland Engineering Limited*, [1972] OLRB Rep. Dec. 1009.)

10. We turn to apply those principles to the facts at hand. The bargaining unit is comprised of some 464 employees. They work on large premises at a single plant in Etobicoke.

11. Mr. Gary Buccella, a representative of the applicant who directed the organizing campaign on its behalf, gave evidence of the union's campaign activities and its efforts to enforce observance of the silent period. The Board accepts Mr. Buccella's testimony. The applicant passed out some 500 buttons of the kind described above at the plant on July 22, 1977, some 13 days before the vote. It also passed out between 500 and 1000 decals between July 18th and 20th, 1977. In addition it handed out some 2,000 leaflets over four separate days, on the 18th, 20th, 22nd and 29th of July, 1977.

12. It was Mr. Buccella's responsibility to instruct the local organizers of the campaign as to the rules and practice to be observed in the campaign. He personally instructed each of the local organizers that no campaign buttons or decals should be worn during the 72-hour silent period and told them to pass that instruction on to the employees who were handed buttons and decals. In the result, some 1000 to 1500 buttons and decals were distributed among a large working force, and on the day of the vote a small number of buttons or decals were displayed by a still smaller number of persons.

13. By breaching the Board's order the employees involved may have made themselves individually liable to an application for consent to prosecute for a breach of The Lab-

our Relations Act. The Board is satisfied, however, that the occurrences on the day of the vote, including the defacing of the sample ballot, were isolated instances carried out by individuals whose actions were out of the effective control of the applicant. The Board is also satisfied that in the circumstances of this case the applicant took all reasonable precautions to avoid any breach of the no-propaganda rule by its officers and its supporters among the employees. Moreover, the isolated infractions which did occur were not such as to call into question the ultimate result of the vote. The request of the incumbent union for a new vote is therefore denied.

14. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

15. Having regard to the agreement of the parties, the Board further finds all employees of Kimberly-Clark of Canada Limited, Borough of Etobicoke, save and except supervisors, temporary supervisors, persons above the rank of supervisors and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The Board is satisfied on the basis of all the evidence before it that not less than thirty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant at the time the application was made.

17. The Board is satisfied on the basis of all the evidence before it that more than fifty per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 12, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

18. A certificate will issue to the applicant.

19. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

0132-77-R International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant), v. **A. V. Hallam Lathing & Plastering Limited**, (Respondent), v. Marble Masons, Tile Layers and Terrazzo Workers Union No. 31, affiliated with the Bricklayers, Masons and Plasters International Union of America, (Intervener #1), v. Operative Plasterers & Cement Masons' International Association of the United States and Canada, Local 124, Ottawa-Hull, (Intervener #2).

Certification – Representation Vote – Effect of no employees voting – Whether new vote should be ordered where failure to cast ballot results from fear that choice will become known.

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: *L. C. Arnold and Sergio Pantarotta for the applicant; Gordon McCarthy and Brian A. D. Holden for the respondent; no one appearing for either intervener #1 or intervener #2.*

DECISION OF THE BOARD: September 8, 1977.

1. This is an application for certification in which the applicant is seeking to displace intervener #1 as the bargaining agent for certain plasterers and plasterers' apprentices in the employ of the respondent.

2. By a decision dated May 6, 1977 the Board directed the taking of a pre-hearing representation vote in which employees would be asked to indicate whether they wished to be represented by the applicant or by intervener #1 in their employment relations with the respondent. At a pre-hearing vote meeting held on May 2, 1976 the parties agreed that any vote directed by the Board should be held on either Friday May 13th or Friday May 20, 1977 between 2:30 and 3:00 p.m. at the respondent's offices in the Thornhill area north of Toronto. A poll was in fact opened at the agreed upon time and place on Friday May 20, 1977. However, none of the six employees listed on an agreed upon voters list presented themselves at the poll to vote.

3. Counsel for the applicant contended that the failure of any of the employees to vote arose out of the fact that the respondent had indicated to the employees that it opposed the application for certification and that therefore they should refrain from voting. On the basis of these allegations counsel requested that the Board certify the applicant outright pursuant to the provisions of section 7a of the Act or, in the alternative, direct the taking of a second representation vote.

4. The applicant already possesses bargaining rights with respect to certain employees of the respondent engaged in drywall taping. Despite this, however, the evidence does establish that the respondent was strongly opposed to the possibility of the applicant being certified to also represent its employees engaged in plastering work. The unrebutted evidence of Mr. Pantarotta, the applicant's business agent, is that prior to the application being filed he was told by Mr. McCarthy, the respondent's vice-president, to stay away from the

respondent's employees because he did not want the applicant to be certified with respect to the respondent's plasterers. Mr. Colafranceschi, the applicant's business manager, testified that on another occasion he was telephoned by Mr. Holden, the president of the respondent, and informed that Mr. Holden preferred that the existing relationship between the applicant and the respondent not be altered. Both Mr. Pantarotta and Mr. Colafranceschi further testified that at the pre-hearing vote meeting Mr. McCarthy made the comment that strange things can happen and that no one might show up for the vote.

5. Although the evidence does establish that the respondent opposed having the applicant become the bargaining agent for the plasterers in its employ, the evidence does not support the applicant's contention that this fact was communicated to the employees. Five of the six employees who had been entitled to cast a ballot were called by the applicant to testify before the Board. (The sixth employee was not called to testify and none of the other employees referred to him in their testimony). Each of the employees who did testify denied that the respondent had indicated to them either that it opposed the application for certification or that they should refrain from voting in the pre-hearing representation vote. Further, each also indicated that the manner in which the respondent conducted its affairs on Friday May 20th was no different than on any other Friday, and particularly a Friday preceding a long weekend. (Monday May 23, 1977 was observed as Victoria Day).

6. The respondent's practices relating to its operations on Fridays bear examining. As a general rule employees are scheduled to work only until 1:00 p.m. on Fridays. Even then, however, if an employee desires to take off the entire Friday he generally will be permitted to do so. The respondent makes a special effort to accommodate employee wishes in this regard if it is a Friday preceding a long weekend. Where an employee is working outside the Toronto area he is scheduled to work somewhat longer hours from Monday to Thursday, and is not scheduled to work at all on Friday. Because of this particular practice two of the employees who were eligible to vote were not scheduled to work at all on May 20th.

7. Despite the fact that the two of the employees were not scheduled to work on the day set for the vote and that the others could probably take the Friday morning off if they so desired, only two employees had decided prior to the evening before the vote that they would not be voting. These were Mr. Mercer, who had previously arranged to attend to some important personal business on Friday afternoon, and Mr. Nakeff who requested and was granted Friday morning off and who took advantage of the four day break to leave the Toronto area with his trailer on Thursday evening. Of the other three employees who testified each stated that it had been his intention to vote, and indeed Mr. Scodellaro had gone so far as to change a dentist's appointment which had been set for Friday afternoon so that he would be free to vote. None of these three employees worked at all on the Friday. Mr. Scodellaro and Mr. Contatto because they had been working out of town during the week and Mr. Nock because he had arranged to take the Friday off.

8. On the Thursday evening preceding the vote Mr. Contatto, who had been working out of town, began to fear that the other employees might take advantage of the long weekend and not turn up to vote. Mr. Contatto testified that he felt that it would be stupid of him to be the only one to vote, and that although the respondent had made no threats to him in this regard he felt that if he was the only one to show up and vote it might result in him losing his job. As a result of these concerns Mr. Contatto made a telephone call to Mr.

Pantarotta of the applicant trade union to ask if he knew whether or not any of the other employees would be going to vote. Mr. Contatto indicated to Mr. Pantarotta that if the other employees were going to vote, he too would do so. Mr. Pantarotta, being mindful of the Registrar's prohibition against electioneering during the seventy-two hour period preceding the day of the vote, cut short the conversation. Before he did so, however, Mr. Contatto asked Mr. Pantarotta if it turned out that he was the only one to vote, could Mr. Pantarotta place him in another job. Mr. Pantarotta replied that no, he would not be able to do so.

9. Mr. Contatto then commenced what was to become a series of telephone conversations among the employees. As best we can make out from the evidence of the employees who testified the sequence of calls was as follows. Mr. Contatto telephoned Mr. Nock and inquired as to whether he knew if the other employees were intending to vote. Mr. Nock's response was that he could not be certain since the long weekend was coming up, but that he would telephone Mr. Mercer to find out. Upon telephoning Mr. Mercer, Mr. Nock was informed that not only was Mr. Mercer not going to vote because of his prior personal plans but also that Mr. Nakeff was planning to be out of town at the time of the vote. Upon receiving this information Mr. Nock then telephoned back to Mr. Contatto and informed him of what he had learnt. In doing so Mr. Nock also added that because the other employees were not going to vote neither would he. (Mr. Nock subsequently left Toronto for the Collingwood area at about 12:30 p.m. on Friday). After concluding his telephone conversation with Mr. Nock, Mr. Contatto then telephoned Mr. Scodellaro, who is his brother-in-law. Mr. Contatto told Mr. Scodellaro that no one, including himself, would be going to vote. In response to this information Mr. Scodellaro decided that he too would refrain from voting.

10. The Board's major concern with respect to the arrangements made for a representation vote is that they allow employees a reasonable opportunity to conveniently cast a ballot. To this end where employees work at their employer's premises the Board will generally require that the vote be held on the employer's premises during working hours. Where employees either work shifts or on an irregular schedule it is common for a number of time periods to be set aside for the vote, and, if necessary, for such time periods to be spread out over more than one day. In construction industry applications the Board's concern that employees be given a reasonable opportunity to conveniently cast a ballot still applies. To this end it is quite common to have a representation vote conducted not at the employer's premises but rather at the construction site or sites where the employees are actually working. Instances do arise, however, where the parties involved in a construction industry application are of the view that it would be more appropriate to have one central polling place to which employees would report in order to cast a ballot. This type of situation generally involves skilled tradesmen who are not only spread around on a number of job sites but who also move from job site to job site on a fairly frequent basis thus making it difficult to determine ahead of time just where they might be working on the date set for the vote. In such circumstances the parties will frequently agree to having a poll located either at the employer's premises or in the lobby of the building which houses the Board's offices at 400 University Avenue in Toronto. Representation votes which are conducted in these circumstances are more often than not conducted during non-working hours, and indeed a number have been conducted on Saturdays when employees were not scheduled to work at all. On the whole little difficulty has arisen with this type of voting arrangement and turnouts of one hundred per cent of the potential voters have not been uncommon.

11. It should be noted that although the Board stands ready to set the time and place for the conduct of representation votes, in the majority of cases the parties are able to agree upon suitable arrangements. Unless for some reason the arrangements made by the parties appear to be inappropriate, those arrangements will in the normal course be accepted by the Registrar.

12. In the instant case the use of a single poll at the respondent's premises on a Friday afternoon was agreed to by the parties. It appears that the applicant's officials were personally unaware of the respondent's practices with respect to Friday work and had also not put their minds to the fact that Monday May 23, 1977 was a holiday. No representative of the respondent testified at the hearing and thus we cannot be certain as to what was in the minds of the respondent's officials with respect to the timing of the vote. However, from Mr. McCarthy's comment concerning the possibility of no one showing up to vote, it appears that the respondent was aware that the timing of the vote was not really conducive to having employees show up to cast a ballot.

13. Although the Board cannot condone the approach taken by the respondent with respect to the timing of the vote, we are of the opinion that the fact that the vote was scheduled for May 20th is not, *by itself*, a sufficient basis upon which to direct the taking of a second vote. While the applicant may in retrospect wish that it had not agreed to the 20th as a possible day for the taking of the vote, the fact remains that it did agree on the date, although perhaps only due to inadequate preparation on its part prior to the pre-hearing vote meeting. It is our view that where parties agree on the arrangements for the taking of a representation vote it is only in the most exceptional cases that one of the parties will later be able to successfully attack the results of the vote on the basis of the circumstances under which the vote was held. Further, we are of the opinion that the voting arrangements which were made in this case were not such as to have made a proper representation vote impossible. Having regard to the manner in which the respondent assigns its employees to various work sites, this is the type of case where the holding of a vote at a central poll outside of working hours would be quite reasonable and appropriate. As noted above, such votes have in other instances been conducted on days when employees were not scheduled to work.

14. The Board recognizes that employees are under no obligation to cast a ballot in a representation vote, and because of this a low turnout of voters has been held not to be sufficient grounds for directing a second vote (See: *Ottawa General Hospital*, [1973] OLRB Rep. Oct. 506). In this case, however, we are concerned about the failure of any of the employees to vote. Particularly disturbing is the fact that right up to the evening prior to the vote three employees intended to vote, but each failed to do so apparently out of a fear that he might be the only one to cast a ballot. Having regard to the timing of the vote this fear was not unreasonable. The Board is concerned that employees be given a reasonable opportunity to come forward to express their wishes in a representation vote. Here, however, the fear of those employees who otherwise intended to vote that they (and presumably their choice of union) might be singled out meant that they were unable to come forward to express their wishes in the vote. We are of the opinion that the employees would likely be able to express their wishes in a representation vote held under somewhat different circumstances than the first. Because of this we feel that this is not an appropriate case for the application of section 7a (even if we were to assume that the requirements of the section had otherwise been met), but that it would be appropriate in the circumstances to both direct the taking of a new representation vote and to require that the arrangements for the vote be made in consultation with the Registrar.

15. The Board therefore directs that a new representation vote be taken of the employees of the respondent in the following voting constituency:

All plasterers and plasterers' apprentices in the employ of A. V. Hallam Lathing & Plastering Limited in Metropolitan Toronto, the Regional Municipality of York, the Regional Municipality of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the Regional Municipality of Halton and the Town of Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman.

16. All employees of the respondent in the voting constituency on the date hereof who have not voluntarily terminated their employment or who have not been discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether they wish to be represented by the applicant or by intervener #1 in their employment relations with the respondent.

18. The parties are directed to consult with the Registrar concerning the arrangements for the taking of the vote.

19. The matter is referred to the Registrar.

0801-77-R United Steelworkers of America, (Applicant), v. Crown Cork & Seal Company Ltd., (Respondent), v. Group of Employees, (Objectors).

Certification – Petition – Whether form of petition clearly indicates opposition to certification of the union.

BEFORE: M. G. Picher, Vice-Chairman and Board Members O. Hodges and F. W. Murray.

APPEARANCES: P. Warrian and M. Shane for the applicant; M. G. Mitchnick, J. Roffey, A. Manze, and S. Markham for the respondent; Moira Bradley, Betty Gibson and R. H. Johnson for the objectors.

DECISION OF THE BOARD: September 27, 1977.

1. This is an application for certification.

2. The name "Crown Cork & Seal Company Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Crown Cork & Seal Company Ltd.".

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. Having regard to the agreement of the parties, the Board further finds that all office and clerical employees of the Respondent Company at Concord, Ontario save and except supervisors, persons above the rank of supervisor, secretary to the President, secretary to the Industrial Relations Manager, secretary to the Chief Financial Officer, secretary to the Controller, Benefits Clerk, Account Coordinator, Assistant Accounting Supervisor, Assistant Paymaster, Engineering Department, Sales and Field Staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation periods, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. For the purposes of clarity the Board notes the agreement of the parties that draftsmen and computer programmers are included in the above bargaining unit.

6. A statement of desire in opposition to the application signed by some 15 employees in the bargaining unit was filed with the Board. The number of persons who signed the petition who had previously signed membership documents in support of the applicant is sufficiently high that doubt would be cast on membership strength of the union on the terminal date if the petition is admissible and voluntary.

7. A preliminary issue arises as to the admissibility of the petition. The preamble of the petition is as follows:

We, the undersigned, (including some who have previously signed the United Steelworkers of America membership cards) are opposed to the United Steelworkers of America becoming the representatives of the salaried non-supervisory personnel of Crown Cork & Seal Company Limited, Concord, unless *ALL* eligible employees involved are given an equal opportunity to vote.

8. Statements of objection, like membership documents, are the primary evidence which the Board acts upon in certification proceedings. It uses these documents rather than *viva voce* evidence out of administrative necessity, since *viva voce* testimony of large numbers of employees would be impracticable, and in order to preserve the confidentiality of individual employees' wishes. In the normal course during the Board's proceedings the membership documents are not disclosed to the employer and the names of petitioners are not disclosed to either the union or the employer. Therefore membership documents and petitions are a form of hearsay evidence on which the Board places great reliance and on which the parties do not have the opportunity of cross-examination. As a result the Board has consistently required a high standard of integrity in the gathering and the form of such evidence, (*Leon's Furniture Ltd.*, [1977] OLRB Rep. Jan 25; *Emmanuel Products Limited*, [1977] OLRB Rep. Feb. 37).

9. The Board has invariably declined to act on the basis of membership evidence that is equivocal or conditional, as where the payment of the initiation fee of \$1.00 by employees is made conditional upon the success of the application for certification (*De Laval Co. Ltd.*, 52 CLLC ¶17,031; *Parmenter & Bulloch Mfg. Co. Ltd.*, 52 CLLC 17,038). The issue raised here is whether a like standard should apply to statements of desire in opposition to a union.

10. Counsel for the respondent submits that the petition filed, if voluntary, has the effect of rendering the membership applications of the petitioners conditional and therefore invalid. He submits that before the terminal date the employees in question attached a condition to their union membership, (i.e. that a vote be taken) and have thereby invalidated their own membership evidence by taking it outside the Board's strict requirement that such evidence must represent an unequivocal intention to join the union.

11. In our view that submission misconceives the issue and begs the very question of the admissibility of the statement of desire. The standard of membership evidence and the standard of evidence of objection to certification are two distinct matters. Before the Board can ask itself whether the statement of desire can cast any cloud on the membership evidence it must ask itself whether it is admissible as evidence of objection to trade union representation. Section 92(2)(j) of The Labour Relations Act provides:

92. – (2) Without limiting the generality of subsection 1, the Board has power,

- (j) to determine the form in which and the time as of which evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be presented to the Board on an application for certification or for a declaration terminating bargaining rights, and to refuse to accept any evidence of membership or objection or signification that is not presented in the form and as of the time so determined;

Section 48 of the Board's Rules of Procedure further provides:

48. – (1) Evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall not be accepted by the Board on an application for certification or for a declaration terminating bargaining rights unless the evidence is in writing, signed by the employee or each member of a group of employees, as the case may be, and,

- (a) is accompanied by,

- (i) the return mailing address of the person who files the evidence, objection or signification, and
- (ii) the name of the employer; and

- (b) is filed not later than the terminal date for the application.

(2) No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in sub-section 1.

- (3) Any employee or group of employees affected by an application for certification or by a declaration of termination of bargaining rights and desiring to make representations to the Board in opposition to the application may file a statement in writing of such desire in the form prescribed by subsection 1 not later than the terminal date for the application, but this subsection does not apply where the Board grants a request that a pre-hearing representation vote be taken.
- (4) An employee or group of employees who has filed a statement of desire in the form and manner required by this section may appear and be heard at the hearing or, in the case of an application to which sections 63 to 75 apply, at any hearing directed by the Board, in person or by a representative.
- (5) The Board may dispose of the application without considering the statement of desire of any employee who fails to appear in person or by a representative and adduce evidence that includes testimony in the personal knowledge and observation of the witness as to,
 - (a) the circumstances concerning the origination of the statement of desire; and
 - (b) the manner in which each signature on the statement of desire was obtained.

12. The first issue, therefore, is whether the petition is a statement by employees who previously signed membership documents that they object to certification or that they no longer wish to be represented by the trade union.

13. It cannot be inferred from the preamble that the employees who placed their signatures under it categorically oppose certification of the trade union. In his representation on behalf of the objectors Mr. R. H. Johnson candidly admitted that the preamble was first drafted in clear opposition to the union and that the words "unless *ALL* eligible employees involved are given an opportunity to vote" were added to the preamble when it became apparent to the sponsors of the petition that employees who supported the union would not sign it otherwise. Seen in that light the petition is essentially an expression of disagreement with certification procedures under the existing legislation. It is not a categorical statement of opposition to the certification of the applicant union.

14. Because the Board must rely on hearsay evidence in applications for certification the documentary hearsay of a statement of desire objecting to certification must be no less clear and unconditional than the documentary hearsay of membership evidence. The membership documents filed are the unequivocal expression of the desire of a number of employees to be represented by the applicant union. Doubt as to the intention, on the terminal date, of the employees who so expressed themselves can be raised only by the submission of equally unequivocal statements of opposition to the union's application properly filed in writing before that date. The purported statement of objection filed in the instant case falls short of that standard and should not be admitted as evidence of objection by employees to certification or as a signification by employees that they no longer wish to be represented by the applicant within the terms of section 48(1) of the Board's Rules of Procedure.

15. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on August 25, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

16. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1977

BARGAINING AGENTS CERTIFIED DURING AUGUST

No Vote Conducted

0282-77-R: Local Union 1739, International Brotherhood of Electrical Workers (Applicant) v. Shakkell Electric and Refrigeration Contractors (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit). (*Having regard to the agreement of the parties*).

0387-77-R: Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa – Hull (Applicant) v. Ferano Construction Ltd. (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit). (*clarity note* – see Report of full decision, [1977] OLRB Rep. August.).

0391-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pavex Repair Services Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note* – see Report of full decision, [1977] OLRB Rep. August.).

0478-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Lofthouse Brass Manufacturing Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Whitby, save and except foremen, persons above the rank of foreman, office and sales staff." (48 employees in the unit).

0498-77-R: Canadian Union of Public Employees (Applicant) v. Smiths Falls Community Hospital (Respondent).

Unit: "all employees regularly employed for not more than 24 hours per week and students employed during the school vacation period engaged at the Smiths Falls Community Hospital, Smiths Falls, Ontario save and except professional medical staff, graduate nursing staff, undergraduate nursing staff, graduate pharmacists, undergraduate pharmacists, graduate dieticians, technical personnel, supervisors, persons above the rank of supervisor, office and clerical staff and persons covered by

subsisting collective agreements.” (193 employees in the unit). (*Having regard to the agreement of the parties*).

0546-77-R: Wood Wire and Metal Lathers International Union Local 562 (Applicant) v. Dietrich Plastering (Sudbury) Limited (Respondent).

Unit: “all lathers and lathers’ apprentices in the employ of the respondent in The Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman.” (13 employees in the unit).

0556-77-R: Local 1590, International Brotherhood of Electrical Workers (Applicant) v. Chromalox Air Conditioning Products, Division of the Canadian Chromalox Company Limited (Respondent).

Unit: “all the employees of the Company at its Drew Road, Mississauga, plant, save and except foremen, those above the rank of foreman, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four (24) hours per week.” (43 employees in the unit).

0568-77-R: United Steelworkers of America (Applicant) v. Do-Ray Lamp Company (Canada) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period.” (75 employees in the unit). (*Having regard to the agreement of the parties*).

0584-77-R: United Steelworkers of America (Applicant) v. Domtar Packaging Limited, Converted Papers Division (Respondent).

Unit: “all employees of the respondent company at Sudbury, save and except foreman, persons above the rank of foreman, office and sales staff.” (3 employees in the unit). (*clarity note – see Report of full decision, [1977] OLRB Rep. August*).

0596-77-R: Local 800, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Sudbury A-1 Plumbing & Heating Ltd. (Respondent) v. Employees (Objectors).

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*clarity note – see Report of full decision, [1977] OLRB Rep. August.*).

0598-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Rosy Construction Co. Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (8 employees in the unit).

0600-77-R: International Union of Bricklayers and Allied Craftsmen, Local Union No. 7 (Applicant) v. J. Corda Construction Ltd. (Respondent).

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0623-77-R: International Union, United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. Reflex Division of International Tools (1973) Ltd. (Respondent).

Unit: "all office and clerical employees of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor, and sales representatives." (5 employees in the unit).

0633-77-R: Funcraft Vehicles Employees Association (Applicant) v. Funcraft Vehicles Limited (Respondent).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, inspectors, office and sales staff, students employed during the school vacation period and students employed during the co-operative work terms." (48 employees in the unit). (*Having regard to this fact the Board is now prepared to accept the agreement of the parties*).

0634-77-R: The Hotel and Club Employees Union, Local 299 affiliated with the Hotel and Restaurant Employees and Bartenders International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. 355978 Ontario Ltd. carrying on business as National Motor Inns (Respondent).

Unit: "all employees of the respondent employed at the National Motor Inn in the Municipality of Metropolitan Toronto save and except supervisors and persons above the rank of supervisor and persons regularly employed for not more than twenty-four hours per week." (22 employees in the unit). (*Having regard to the agreement of the parties*).

0637-77-R: Canadian Union of Public Employees (Applicant) v. Milton District Hospital (Respondent):

Unit: "all employees of the respondent at Milton, who are regularly employed for not more than 23 1/4 hours per week, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, under-graduate pharmacists, graduate dieticians, student dieticians, technical personnel, supervisors, persons above the rank of supervisor, chief engineer and office staff." (36 employees in the unit).

0641-77-R: Service Employees Union, Local 204, Affiliated with SEIU, A.F. of L., C.I.O., C.L.C. (Applicant) v. Extendicare Ltd. (Respondent).

Unit: "all employees of the respondent at Mississauga, who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements." (46 employees in the unit). (*Having regard to the agreement of the parties*).

0642-77-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Medi Park Lodges Inc. carrying on business as Oakwood Park Lodge (Oakwood Drive, Niagara Falls) (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its Oakwood Park Lodge, Niagara Falls, save and except

professional medical staff, registered nurses, graduate nurses and undergraduate nurses, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (51 employees in the unit). (*Having regard to the agreement of the parties*).

0644-77-R: Canadian Union of Public Employees (Applicant) v. St. Lawrence Lodge, Home for the Aged, a joint municipal Home for the Aged. Operated by the United Counties of Leeds & Grenville, the City of Brockville, the separated town of Prescott and the separated town of Gananoque (Respondent).

Unit: "all employees of the respondent in its home for aged in Brockville, save and except professional and medical staff, graduate nursing staff, undergraduate nurses, Dept. Heads, persons above the rank of Department Heads, technical personnel and office staff." (89 employees in the unit). (*Having regard to the agreement of the parties*).

0665-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. John A. Andreoli Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

0668-77-R: Laborers' International Union of North America, Local 247 (Applicant) v. Consortium Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0678-77-R: Christian Labour Association of Canada (Applicant) v. Delhi Nursing Home (Respondent).

Unit: "all employees of the respondent at its nursing home at 750 Gibraltor Street in Delhi who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except registered nurses, supervisors, persons above the rank of supervisor and office staff." (13 employees in the unit).

0683-77-R: Service Employees Union, Local 204 affiliated with the A.F. of L., CIO, CLC (Applicant) v. Heutinck Nursing Home Ltd. (Respondent).

Unit: "all employees of the respondent at Hilltop Manor in Cambridge, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (33 employees in the unit). (*Having regard to the agreement of the parties*).

0687-77-R: Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Riverside Elevators Incorporated (Respondent).

Unit: "all elevator mechanics and elevator mechanics' helpers in the employ of the respondent in the Counties of Kent and Essex, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0691-77-R: Labourers International Union of North America, Local 506 (Applicant) v. Ontario Motor League – Toronto Club (Respondent).

Unit: "all Emergency Road Service Field Representatives employed by the respondent working at and out of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff." (37 employees in the unit). (*Having regard to the agreement of the parties*).

0694-77-R: Christian Labour Association of Canada (Applicant) v. Saccucci Forming Company Ltd. (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Local Union 249 (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the County of Lennox and Addington, and the County of Frontenac and the Townships of Rear of Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0695-77-R: Canadian Transportation Workers Union No. 158 N.C.C.L. (Applicant) v. Capital Sanitation Division of: Interflow Systems Limited (Respondent).

Unit: "all employees of the respondent working at or out of Ottawa, save and except foremen and dispatchers, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week." (12 employees in the unit). (*Having regard to the agreement of the parties*).

0699-77-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Brown's Concrete Investments Company (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working in and out of Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and employees regularly employed for not more than twenty-four (24) hours per week." (3 employees in the unit).

0700-77-R: The Sheet Metal Workers' International Association Local Union No. 562 (Applicant) v. Mundy Air Limited (Respondent).

Unit: "all sheet metal workers and sheet metal workers' apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0709-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. D'Amore Construction (Windsor) Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of

Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

0711-77-R: The Association of Allied Health Professionals: Ontario (Applicant) v. St. Mary’s of the Lake Hospital (Respondent).

Unit: “all paramedical employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors and persons above the rank of supervisor, sisters, and interns in occupational therapy, physiotherapy and pharmacy.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

0712-77-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Chimo Lumber Ltd. (Respondent).

Unit: “all employees of the respondent at Milton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (45 employees in the unit). (*Having regard to the agreement of the parties*).

0713-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Two-Four Construction Ltd. (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

0714-77-R: Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Applicant) v. North Star Plumbing Limited (Respondent).

Unit: “all plumbers and plumbers’ apprentices, steamfitters and steamfitters’ apprentices, gasfitters and gasfitters’ apprentices in the employ of the respondent in the Townships of Kirkland Lake and the Geographic Townships (unorganized) immediately adjacent thereto in the District of Timiskaming, save and except non-working Foremen and persons above the rank of non-working foreman.” (5 employees in the unit). (*clarity note – see Report of full decision, [1977] OLRB Rep. August*).

0723-77-R: Labourers’ International Union of North America, Local 527 (Applicant) v. Thom Construction Ltee (Respondent).

Unit: “all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman.” (6 employees in the unit).

0724-77-R: Christian Labour Association of Canada (Applicant) v. Saccucci Forming Company Ltd. (Respondent).

Unit: “all carpenters, carpenters’ apprentices and construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-

working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0727-77-R: Ontario Nurses' Association (Applicant) v. MacLaren House Nursing Homes (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at MacLaren House Nursing Home, Ottawa, save and except Director of Nurses and persons above the rank of Director of Nurses and employees regularly employed for not more than twenty-four hours per week." (5 employees in the unit).

Unit #2: "all registered and graduate nurses regularly employed in a nursing capacity at MacLaren House Nursing Home, Ottawa for not more than twenty-four hours per week save and except the director of nurses and persons above that rank." (4 employees in the unit).

0734-77-R: International Association of Machinists and Aerospace Workers (Applicant) v. CAE Fiberglass Products Ltd. (Respondent).

Unit: "all employees of the respondent in the City of Guelph, save and except foremen, persons above the rank of foreman, office and sales staff." (29 employees in the unit).

0735-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tamaran Construction Co. Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0743-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 91 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. National Drug and Chemical Company of Canada Limited (Respondent).

Unit: "all employees of the respondent working at or out of Ottawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

0744-77-R: Retail Clerks Union, Local 206 chartered by the Retail Clerks International Association (Applicant) v. J. Montemurro Incorporated (Respondent).

Unit: "all employees of the respondent at Kirkland Lake, Ontario, save and except assistant store manager and persons above the rank of assistant store manager." (24 employees in the unit).

0752-77-R: Toronto Typographical Union No. 91, (I.T.U.) (Applicant) v. Argo Printing House (Meflor Printing Co. Ltd.) (Respondent).

Unit: "all employees of Argo Printing House, engaged in the composing room, press room, bindery and offset preparatory work, at Metropolitan Toronto, save and except non-working foremen and those above the rank of non-working foreman." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0754-77-R: Christian Labour Association of Canada (Applicant) v. Frigid Insulation Limited (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0756-77-R: Service Employees Union, Local 204 Affiliated with the A. F. of L., C.I.O., C.L.C. (Applicant) v. Midland District Ambulance Service (Respondent).

Unit: "all employees of the respondent in Midland, save and except owner-operator." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0762-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Tacc Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

0765-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tacc Construction Co. Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (17 employees in the unit).

0769-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 785 (Applicant) v. Dewcon Structures Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Brant and Norfolk, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0770-77-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Brewers' Warehousing Company Limited (Respondent).

Unit: "all clerical employees of the respondent at its Group Office at Belleville, save and except foremen or managers, persons above the rank of foreman or manager and persons covered by a subsisting collective agreement between the respondent and United Brewers' Warehousing Provincial Board, Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0777-77-R: Canadian Union of Public Employees (Applicant) v. Lincoln County Humane Society (Respondent).

Unit: "all employees of the respondent, save and except inspectors, managers, persons above the rank of inspector or manager, persons who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in the unit).

0780-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Sun Parlour Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0805-77-R: Wood, Wire and Metal Lathers International Union, Local 562 (Applicant) v. Nogueira Lathing (Respondent).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0268-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Central Stampings Limited (Respondent) v. Christian Labour Association of Canada, (C.L.A.C.) (Intervener) v. Group of Employees (Objectors).

Unit: "all employees of Central Stampings Limited at Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (185 employees in the unit).

Number of names of persons on revised voters' list	138
Number of persons who cast ballots	135
Ballots segregated and not counted	1
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	70
Number of ballots marked in favour of intervener	61

0369-77-R: Niagara Peninsula Beverage Dispenser & Hotel Employees Union (Applicant) Local 199 U.A.W. Building Corporation (Respondent) v. Local 756 of the Hotel & Restaurant Employees and Bartenders International Union (Intervener).

Unit: "all full and part-time employees employed by the Company in the categories bartender, waiter, bar boy improvisor, janitor." (12 employees in the unit).

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	9
Number of ballots marked in favour of intervener	2

0547-77-R: International Woodworkers of America (Applicant) v. Travel Mate Motor Homes Limited (Respondent).

Unit: "all employees of the Respondent, Owen Sound, Ontario, save and except foremen, persons

above the rank of foreman, office and sales staff, employees engaged in plumbing, heating and electrical work not connected with the Manufacturing of Travel Mate Motor Homes Limited, persons regularly employed for not more than 24 hours per week, and students employed during school vacation period." (40 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	38
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	18

0554-77-R: United Steelworkers of America (Applicant) v. Crown Cork & Seal Company Limited (Respondent) v. Graphic Arts International Union, Local 12-L, Toronto (Intervener #1) v. Crown Cork & Seal Employees' Association (Intervener #2).

Unit: "all employees of the respondent at 7900 Keele Street, Concord, L4K 1B6, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, security staff, lunch room attendants, salaried employees, students employed during the school vacation period and persons covered by the certificate issued to the Graphic Arts International Union, Local 12-L, Toronto." (261 employees in the unit).

Number of names of persons on revised voters' list	245
Number of persons who cast ballots	198
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	133
Number of ballots marked in favour of intervener #2	64

0562-77-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Fisher & Ludlow Limited (Respondent) v. The Steel Fabricators Association (Intervener).

Unit: "all the Company's employees at its plant, located at Appleby Line, Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff and students hired for the school vacation period." (49 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	48
Number of persons who cast ballots	42
Number of ballots marked in favour of applicant	40
Number of ballots marked in favour of intervener	2

Application Certified Subsequent to Post-Hearing Vote

0427-77-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union A.F.L.-C.I.O.-C.L.C. (Applicant) v. City Parking Holdings Limited (Respondent).

Unit: "all beerex waiters and waitresses in the employ of the respondent at the Piccadilly Tube, Toronto." (12 employees in the unit).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	1

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0534-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mor-Alice Construction Limited (Respondent). (19 employees).

0535-77-R: Labourers' International Union of North America Local Union No. 597 (Applicant) v. Tacher Construction Enterprises Ltd. (Respondent). (2 employees).

0538-77-R: United Steelworkers of America (Applicant) v. Alumicor Manufacturing Limited (Respondent) v. Group of Employees (Objectors). (57 employees).

0587-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Pisa Contractors (Respondent). (4 employees).

0636-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. Don Regan Construction (Respondent). (3 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1487-76-R: Office and Professional Employees' International Union Local 131, AFL-CIO-CLC (Applicant) v. Tele-Direct Ltd. (Respondent) v. Canadian Telephone Employees' Association (Intervener).

Voting Constituency: "All employees of the respondent engaged as layout artists and camera operators working at or out of Metropolitan Toronto, Burlington and Waterloo, Ontario, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period." (680 employees).

Number of names of persons on list as originally prepared by employer	1
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	1

Ballot Box Sealed

1488-76-R: Office and Professional Employees' International Union Local 131, AFL-CIO-CLC (Applicant) v. Tele-Direct Ltd. (Respondent) v. Canadian Telephone Employees' Association (Intervener).

Voting Constituency: "All employees of the respondent engaged as layout artists and camera operators working at or out of Metropolitan Toronto, Burlington and Waterloo, Ontario, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period." (2 employees).

Number of names of persons on list as originally prepared by employer	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	2

Ballot Box Sealed

1489-76-R: Office and Professional Employees' International Union Local 131, AFL-CIO-CLC (Applicant) v. Tele-Direct Ltd. (Respondent) v. Canadian Telephone Employees' Association (Intervener).

Voting Constituency: "All employees of the respondent engaged as layout artists and camera operators working at or out of Metropolitan Toronto, Burlington and Waterloo, Ontario, save and except supervisors, persons above the rank of supervisor and students employed during the school vacation period." (1 employee).

Number of names of persons on revised list	21
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	19

Ballot Box Sealed

0012-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Sealex Waterproof Coatings Limited (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of The United States and Canada (Intervener #1) v. General Contractors' Section of The Toronto Construction Association (Intervener #2).

Voting Constituency: "All journeymen waterproofers, apprentice waterproofers, improvers and journeymen trainees in the employ of Sealex Waterproof Coatings Limited engaged in waterproofing and/or restoration work in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees).

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	5

0206-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Continental Concrete Finishing Limited (Respondent) v. Local 598 of the Operative Plasterers and Cement Masons International Association of The United States and Canada (Intervener).

Voting Constituency: "All cement masons and their apprentices in the employ of Continental Concrete Finishing Limited, engaged in the industrial, commercial and institutional sector in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	7

Certification Dismissed Subsequent to Post-Hearing Vote

0115-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. H. T. Reaume Construction Ltd. (Respondent) v. Chatham Construction Workers Association Local No. 53, affiliated with the Christian Labour Association of Canada (Intervener).

Unit: "all employees of the respondent in the Counties of Essex and Kent, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foremen." (2 employees in the unit).

Number of names of persons on revised voters'	4
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	1
Number of ballots marked in favour of intervener	3

0496-77-R: United Garment Workers of America (Applicant) v. Panama Sportswear Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, head shipper and persons regularly employed for not more than 24 hours per week." (20 employees in the unit).

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	13
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	9

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0276-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. George Wimpey Canada Ltd. (Respondent). (9 employees).

0482-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Chapman Homes (A Division of Altona Heights Properties) (Respondent). (5 employees).

0529-77-R: Laundry, Dry Cleaning & Dye House Workers' International Union, Local 351 (Applicant) v. Dominion Linen Supply (Respondent). (40 employees).

0624-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Charter-Global Developments Limited (Respondent). (6 employees).

0670-77-R: Labourers' International Union of North America, Local 247 (Applicant) v. David K. Lansdowne and Partners Limited (Respondent). (3 employees).

0674-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tacc Construction Co. Ltd. (Respondent). (9 employees).

0708-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Moir Construction Co. Ltd. (Respondent). (13 employees).

0739-77-R: Amalgamated Meat Cutters & Butcher Workmen of North America AFL CIO CLC (Applicant) v. Beatrice Foods (Ontario) Limited Avondale Dairy Division (Respondent). (142 employees).

0745-77-R: Canadian Paperworkers Union (Applicant) v. B A S F Canada Ltd. Cornwall Works Division (Respondent). (4 employees).

0806-77-R: Sheet Metal Workers' International Association, A.F.L.-C.I.O.-C.L.C., Local Union No. 269 (Applicant) v. The Miller Bros. Co. (1962) Ltd. (Respondent). (7 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0080-77-R: Bernadette Wardman (Applicant) v. The Toronto Newspaper Guild, Local 87 of The Newspaper Guild (Respondent) v. Bargain Hunter Press (Intervener). (*Dismissed*).

Unit: "all office, clerical and technical employees of the intervener at Metropolitan Toronto save and except the office manager and persons above the rank of office manager." (21 employees in the unit).

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	16
Number of ballots marked in favour of Respondent	2
Number of ballots marked against Respondent	14

0196-77-R: Jack P. Fogal (Applicant) v. Toronto Typographical Union, No. 91 (Applicant) v. CCH Canadian Limited (Intervener). (*Terminated*).

Unit: "all employees of CCH Canadian Limited at Metropolitan Toronto engaged in composing room work, including Typesetters, compositors, stonemen and proofreaders, save and except non-working foremen and persons above the rank of non-working foreman." (38 employees in the unit).

Number of names of persons on list as originally prepared by employer	38
Number of persons who cast ballots	34
Number of ballots marked in favour of Respondent	13
Number of ballots marked against Respondent	21

0646-77-R: Walter Houtby, Frank Chaytor, George Woodhouse, Wilf Bylow, Martin Coyne (Applicant) v. United Electrical, Radio and Machine Workers of America and its Local 535 (Respondent). (4 employees). (*Granted*).

0753-77-R: Dan Mailloux (Applicant) v. The United Steel Workers of America (Respondent) v. McGraw-Edison of Canada Limited (Intervener). (6 employees). (*Granted*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

0464-77-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Nelson Crushed Stone, A Division of King Paving and Materials, A Division of the Flintkote Company of Canada Limited (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0696-77-U: Environmental Technical Services Inc. (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 249 and Angus Froats: Labourers' International Union of North America Local 247 and M Sullivan (Respondents) v. Christian Labour Association of Canada (Intervener). (*Granted*).

0698-77-U: Canadian Badger Company Limited (Applicant) v. International Association of Heat and Frost Insulators and Asbestos Workers Local 95, Victor Churley, Joe Duffy, Alfred Kirton, Those persons named on Schedule 'A' hereto and Norman Lachance, Geff Howley and Tony Bernard (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0567-77-U: Laundry, Dry Cleaning & Dye Hause Workers' International Union, Local 351 (Applicant) v. Dominion Linen Supply Limited and Joseph Davitjan (Respondents). (*Withdrawn*).

0576-77-U: International Beverage Dispensers' & Bartenders Union of the Hotel and Restaurant Employees' and Bartenders' International Union, Local 280, AFL, CIO, CLC, (Applicant) v. Oakwood Hotel (Toronto) Limited (Respondent). (*Dismissed*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0225-77-U: Local 304 – Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Molson's Brewery (Ontario) Limited, Toronto (Respondent). (*Dismissed*).

0495-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. Pavex Repair Service Limited and A. Keith Webster (Respondents). (*Withdrawn*).

0521-77-U: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Ontario Pallet Limited (Respondent). (*Granted*).

0654-77-U: United Garment Workers of America and its Local 253 (Applicant) v. Abbey Crest Limited (Respondent). (*Dismissed*).

0667-77-U: United Garment Workers of America, and its Local 253 (Applicant) v. Outdoor Outfits Limited (Respondent). (*Dismissed*).

0685-77-U: Kenneth Garvey (Applicant) v. Canadian Paperworkers Union CLC Local 685 (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1295-76-U: Corrado Di Sabatino, S. Ippolito, Louis Fidanza, Joseph K. Joseph and Antonio Di Giammatteo (Complainants) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 879, Leonard Schultz, Luigi Pasinato & Adbo Contracting Company Ltd. (Respondents). (*Dismissed*).

1987-76-U: Frank Sarcinella (Complainant) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647 (Respondent) v. Dad's Cookies Ltd. (Intervener). (*Terminated*).

2181-76-U: Canadian Paperworkers Union (Complainant) v. Lawson Graphics Printing Specialties and Paper Products Union Local 446 (Respondents). (*Withdrawn*).

0004-77-U: Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Consumers Distributing Company Limited and Oil & Gas Technicians, Service, Domestic and General Workers Union, Local 1267, L.I.U.N.A. (Respondents).

- and -

2200-76-U: Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Consumers Distributing Company Limited (Respondent). (*Granted*).

0223-77-U: Local 304 – Canadian Union of United Brewery Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Molson's Brewery (Ontario) Limited, Toronto (Respondent). (*Dismissed*).

0262-77-U: Canadian Union of Blind & Sighted Merchants Local 681, SEIU, AFL, CIO, CLC (Complainant) v. The Canadian National Institute for the Blind (Ontario Division) (Respondent). (*Withdrawn*).

0310-77-U: Graphic Arts International Union, Local 28-B (Complainant) v. Bruce Henderson Limited; Council of Printing Industries of Canada (Respondent). (*Granted*).

0314-77-U: Monica Spence (Complainant) v. The Canadian Union of Public Employees and its Local 2001 (Respondent) v. Toronto General Hospital (Intervener). (*Dismissed*).

0316-77-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Complainant) v. Windsor Tube & Metal Inc. (Respondent). (*Granted*).

0323-77-U: Reinaldo Santos (Complainant) v. Ed's Warehouse (Respondent). (*Dismissed*).

0494-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Pavex Repair Services Limited and A. Keith Webster (Respondents). (*Withdrawn*).

0501-77-U: Canadian Union of Operating Engineers, Local 101 (Complainant) v. Peel Memorial Hospital (Respondent). (*Withdrawn*).

0536-77-U: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Ontario Pallet Limited (Respondent). (*Granted*).

0577-77-U: International Beverage Dispensers' & Bartenders Union of the Hotel and Restaurant Employees & Bartenders' International Union, Local 280, AFL-CIO-CLC (Complainant) v. Oakwood Hotel (Toronto) Limited (Respondent). (*Granted*).

0588-77-U: United Cement, Lime, and Gypsum Workers International Union AFL-CIO-CLC (Complainant) v. Nelson Crushed Stone, A Division of King Paving and Materials A Divison of The Flintkote Company of Canada Ltd. (Respondent). (*Withdrawn*).

0632-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Lanark Furniture (1969) Limited (Respondent). (*Withdrawn*).

0648-77-U: United Steelworkers of America (Complainant) v. Cochrane Tool and Design Limited (Respondent). (*Withdrawn*).

0652-77-U: United Garment Workers of America, Local 253 (Complainant) v. Abbey Crest Limited (Respondent). (*Granted*).

0653-77-U: United Garment Workers of America, Local 253 (Complainant) v. Outdoor Outfits Limited (Respondents). (*Granted*).

0666-77-U: Mr. Robert Whitson (Complainant) v. Christian Labour Association of Canada (Respondent). (*Withdrawn*).

0672-77-U: United Steelworkers of America (Complainant) v. Do-Ray Lamp Company (Canada) Ltd. (Respondent). (*Withdrawn*).

0686-77-U: Kenneth Garvey (Complainant) v. Canadian Paperworkers Union CLC Local 685 and Purity Packaging Limited (Respondents). (*Withdrawn*).

0704-77-U: Allan Murphy (Complainant) v. United Steelworkers of America, Local 2900 (Respondent). (*Withdrawn*).

0705-77-U: William Murphy (Complainant) v. United Steelworkers of America, Local 2900 (Respondent). (*Withdrawn*).

0716-77-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Sherman Sand and Gravel Ltd. (Respondent). (*Withdrawn*).

0730-77-U: Robert Whitson (Complainant) v. Central Stampings Limited (Respondent). (*Withdrawn*).

0731-77-U: Robert Whitson (Complainant) v. Christian Labour Association of Canada (Respondent). (*Withdrawn*).

0737-77-U: Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Association (Complainant) v. Bittners Meat & Delicatessen Market (Respondent). (*Withdrawn*).

0782-77-U: Hotels, Clubs, Restaurants, Taverns, Employees Union Local 261 (Complainant) v. Holiday Motel and Restaurant Limited (Respondent). (*Withdrawn*).

0783-77-U: Hotels, Clubs, Restaurants, Taverns, Employees Union Local 261 (Complainant) v. Holiday Motel and Restaurant Limited (Respondent). (*Withdrawn*).

0788-77-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Graham Bros. Construction Limited (Respondent). (*Withdrawn*).

0789-77-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Graham Bros. Construction Limited (Respondent). (*Withdrawn*).

0813-77-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Graham Bros. Construction Limited (Respondent). (*Withdrawn*).

0814-77-U: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Graham Bros. Construction Limited (Respondent). (*Withdrawn*).

0835-77-U: Hotels, Clubs, Restaurants, Taverns Employees Union Local 261 (Complainant) v. Holiday Motel and Restaurant Limited (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

2152-76-M: Office & Professional Employees International Union, Local 161 (Applicant) v. Smooth Rock Falls Hospital Corporation (Respondent). (*Dismissed*).

0127-77-M: Electrical Workers Local 911 (Applicant) v. Belle River Hydro Electric Commission (Respondent).

0272-77-M: Service Employees International Union, Local 183 (Applicant) v. Beacon Hill Lodges of Canada Limited (Respondent). (*Dismissed*).

0273-77-M: Canadian Union of Public Employees and its Local # 1565 (Applicant) v. V.S. Services (Barton Place Nursing Home) (Respondent).

0410-77-M: St. Vincent Hospital (Applicant) v. Ontario Nurses' Association (Respondent). (*Granted*).

0474-77-M: The Corporation of the City of London (Applicant) v. C.U.P.E. Local Union No. 101 (Respondent). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

0614-77-M: Unifin Division of Keeprite Products Limited (Employer) v. International Union, United Automobile Aerospace and Implement Workers of America, (U.A.W.) and its Local 27 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112A

1784-76-M: Labourers' International Union of North America, Local 183 (Applicant) v. Crestwood Construction Inc. (Respondent). (*Terminated*).

0241-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 46 (Applicant) v. Industrial Contractors Association Stone & Webster Canada Limited (Respondent). (*Withdrawn*).

0285-77-M: Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 151, London, Ontario (Applicant) v. The Lummus Company of Canada Limited (Respondent). (*Granted*).

0308-77-M: Stone & Webster Canada Limited Industrial Contractors Association (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local 46; Leslie Swan, a job steward of Local 46 and B. Weather-up, a business agent of Local 46 (Respondent). (*Withdrawn*).

0397-77-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Collegiate Sports Ltd., and General Contractors' Section of The Toronto Construction Association (Respondents). (*Dismissed*).

0453-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. W-A Construction Company Limited, carrying on business under the firm name and style of Falco Property Management and Yucca Investments Limited (Respondents). (*Withdrawn*).

0461-77-M: The Lummus Company of Canada Limited (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent). (*Withdrawn*).

0606-77-M: Labourers' International Union of North America, Local 506 (Applicant) v. F. T. Foundation Company Limited (Respondent). (*Withdrawn*).

0746-77-M: Local Union 221 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Mechanical Contractors' Association, Kingston and Tri-M Plumbing & Heating Limited (Respondents). (*Terminated*).

0772-77-M: International Brotherhood of Painters and Allied Trades, Glaziers Local Union 1819 (Applicant) v. Peel Glass & Mirror Limited and Architectural Glass and Metal Contractors Association (Respondents). (*Withdrawn*).

0791-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. D. & R. Ventura General Construction Limited (Respondent). (*Withdrawn*).

0792-77-M: The Labourers' International Union of North America, Local 183 (Applicant) v. Sutherland Underground Electric Ltd. (Respondent). (*Withdrawn*).

0802-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. VBN Construction Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1449-76-U: International Chemical Workers, Local 159 (Complainant) v. Kodak Canada Ltd. (Respondent). (Section 79). (*Request Denied*).

1759-76-U: Frank Howell-Harries (Complainant) v. International Chemical Workers Union (Respondent #1) v. Canadian International Paper Company (Respondent #2). (Section 79). (*Request Denied*).

ONTARIO LABOUR RELATIONS BOARD

Monthly Case Breakdown—Disposition and Comparison for August 1977 (fiscal year 1977-78)

Case Type	Applications Received		Total Disposed of			Disposed of During: August			Pending	Disposed of Last Month		
	During: August	Last Month	During: August	Last Month	Granted	Dismissed	Withdrawn	Granted	Dismissed	Withdrawn	Pending	
Certification	68	73	88	71	60	18	10	179	53	12	6	204
Termination	6	1	4	7	3	—	1	12	1	3	3	9
Section 1(4)	—	—	1	1	—	—	1	6	—	1	—	9
*Successor Status	10	1	1	1	—	1	—	8	1	—	—	17
Accreditation	—	—	—	—	—	—	—	7	—	—	—	7
Unlawful Strike	—	2	—	—	—	—	—	32	—	—	—	32
Unlawful Lockout	—	1	—	2	—	—	1	—	—	—	—	1
Prosecutions	1	9	6	2	2	2	2	114	—	—	2	119
Section 79	36	40	34	32	7	7	20	180	2	11	19	186
**Declaration of Unlawful Strike or Lockout												
***Misc.	.23	25	16	15	3	3	10	198	6	1	8	200
Bill 139	1	—	—	—	—	—	—	1	—	—	—	—
TOTAL	146	165	154	135	76	32	46	805	66	28	41	856 ¹

NOTE: The Pending figures found directly beside the section "Disposed of During: _____" are a consolidation of those cases received during the month and pending into the next, and the pending cases from the previous month.

*Sections 54 and 55 are consolidated.
 **Sections 123, 82, 83 and 63 are consolidated.
 ***Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) are consolidated.



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ONTARIO LABOUR RELATIONS BOARD REPORTS

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1394-75-R York University Faculty Association, (Applicant), v. **York University**, (Respondent), v. Osgoode Hall Faculty Association, et al, (Intervener), v. Group of Employees, (Objectors).

Certification – Bargaining Unit – Employee – Whether law professors are excluded from the Labour Relations Act – Whether in the circumstances the law faculty has a separate community of interest.

BEFORE: D.H. Kates, Vice-Chairman and Board Members H.J.F. Ade and P.J. O'Keeffe.

APPEARANCES: *J. Sack for the applicant; W. Farr for the respondent; D.J.M. Brown for the intervener; no one appearing for the objectors.*

DECISION OF D.H. KATES, VICE CHAIRMAN AND BOARD MEMBER H.J.F. ADE: October 18, 1977.

1. The Board in its decision dated 6th April, 1976 granted the applicant trade union an interim certificate entitling it to bargain on behalf of a bargaining unit of full-time faculty members and professional librarians at York University. At issue at that time was the status of law professors assigned to the respondent's Osgoode Hall Law School.

2. The Osgoode Hall Faculty Association (hereinafter referred to as the "intervener") has intervened on behalf of some of the law professors and, as such, established its status to adduce evidence and make submissions on the issues affecting the employment status of the law professors. Counsel for the applicant wished the record to be noted that the intervener is not a trade union under section 1(1)(n) of the Act nor can it legitimately purport to represent all professors assigned to the respondent's law school. Indeed, the documentary evidence of membership established that of the approximately forty professors concerned eight have signed cards indicating a desire to be represented by the applicant for collective bargaining purposes.

3. The intervener does not claim to be a trade union for purposes of section 1(1)(n) of the Act. Although this may appear to be the case, counsel reserved the intervener's right should events subsequently require it to establish its trade union status. Nor was it disputed that the intervener at any time purported to represent the total faculty at the law school. From the Board's point of view, it is not necessary, having regard to our practice that the intervener establish a particular quantum of representation, to justify its presence for the purposes of participating in these proceedings. Suffice it to say that an association that purports to represent employees need not be a trade union nor represent a large number of employees to justify its status as a party before the Board. The Board only requires that anyone wishing to intervene in our proceedings establish some representative capacity with respect to at least one person who has a direct interest in the outcome. The applicant trade union does not dispute this to be the situation with respect to the intervener's status as a party to these proceedings. (See: the *Essex Health Association* [1967] OLRB Rep. Feb. 885; *The Sheraton Limited-Sheraton Connaught Hotel* [1972] OLRB Rep. Mar. 249 at page 253.)

4. The intervener asserts that law professors engaged at the Osgoode Hall Law School are employed in a professional capacity as defined under section 1(3)(a) of the Act,

and, therefore, ought to be excluded from the bargaining unit. At the outset, counsel for the intervener conceded that the approximately 25% of the law faculty who have yet to be admitted to the Bar were not within the scope of the exclusion, and, therefore, were employees for purposes of the Act. The thrust of counsel's argument pertained to the balance of the faculty who are members of the Bar and who as teachers are employed in a professional capacity. For purposes of clarity, teachers for purposes of the issues raised herein, are not intended to be confined to the pedagogical concerns of the classroom but also pertains to other academic endeavours, such as legal research, which are normally identified with scholarly pursuits. Section 1(3)(a) reads as follows:

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

- (a) who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity;...”

5. Alternatively, if not coincidentally, the intervener asserts that the law professor, insofar as he may be considered to be an employee for purposes of the Act, does not share a community of interest with other faculty members engaged in non-professional disciplines throughout the respondent's university. In support of this submission counsel relied heavily upon the special status of the Law Faculty having regard to the historical circumstance of the Osgoode Hall Law School as once being under the exclusive supervision of The Law Society of Upper Canada. Indeed, the Memorandum of Agreement executed by York University and The Law Society of Upper Canada, dated October 15th, 1966, is said to have preserved this special status as a substantial term of the affiliation of the Osgoode Hall Law School as a faculty of York University. Section 6(1) of the Act reads as follows:

“6 – (1) Subject to subsection 1a, upon an application for certification, the Board shall determine the unit of employees that is appropriate for collective bargaining, but in every case the unit shall consist of more than one employee and the Board may, before determining the unit, conduct a vote of any of the employees of the employer for the purpose of ascertaining the wishes of the employees as to the appropriateness of the unit.

(1a) Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.”

6. The applicant trade union denied there was any basis for the exclusion of the law professor from the bargaining unit under section 1(3)(a) of the Act and asserted that the law professor, notwithstanding the historical basis of the affiliation of the law school with the respondent university, is an appropriate member of the all-faculty bargaining unit having regard to the past considerations applied by this Board in assessing the community of interest of employees. Of utmost significance to the applicant's argument was the emphasis placed upon the Board's aversion to the fragmentation of bargaining units. The respondent univer-

sity has adhered to its consistent posture throughout these proceedings of assuming no position with respect to the issues pertaining to the status of the law professor.

7. The intervener does not suggest that the law professor, to the extent he may be a member of the Bar and entitled to practice in Ontario, is in any way engaged as "a barrister or solicitor" contemplated by *The Law Society Act*, R.S.O. 1970, c.238 section 28(c). The exceptions to this particular circumstance may very well be The Director and The Supervisor respectively of The Parkdale Community Legal Aid Services and The Community Legal Advice and Services Project (known as "CLASP"). There is also no dispute that some members of the Law Faculty are retained as consultants, researchers, arbitrators and in other capacities apart from their teaching and academic functions at the law school. Nonetheless, they are remunerated by the clients who retain their services and, as such, these activities constitute functions aside from their regular duties. Dean Arthurs, however, did emphasize that the experience of law teachers in "the practice of law" was a consideration with respect to the negotiations of salary and the determination of qualifications for tenure and promotion within the university hierarchy. The Dean also indicated that there were limits to the amount of extra-curricular work the law professor could perform and that, obviously, was premised upon his exercise of good judgment.

8. Whatever the law professor's practical background experience may be, the intervener rested its case on the premise that the law professor, having regard to his teaching functions and the recognition of his importance by the monitoring influence of The Law Society, is necessarily and integrally connected with, or pertaining to, the legal profession. In measuring the significant contribution made by the law professor to the development of the legal profession it is submitted that he ought to be considered as being employed in a professional capacity for purposes of section 1(3)(a) of the Act. Moreover, the recognition by the Law Society of the law professor's importance is demonstrated by numerous references to legal education and the role of the law professor in *The Law Society Act*. For example, it is shown in section 28 that "a full time law teacher at each law school in Ontario" is to be appointed to "The Advisory Council" charged with the responsibility of considering "the manner in which members of the Society are discharging their obligations to the public and generally matters affecting the legal profession as a whole." Reference was also made to sections 51 and 57 of *The Law Society Act* with a view to showing on the one hand the Law Society's interest in the advancement of legal education by virtue of its participation in The Law Foundation and, on the other, by its powers to make rules and regulations governing the minimal requirements of course content taught at the law schools in the Province as a condition for qualifying for the Bar. Needless to say, the Law Society's pervasive control over the admission of members to the Bar inclusive of law professors under Regulation 9(2) of *The Law Society Act* is ample justification, in counsel's view, for finding an integration of the functions of the law professor with the practitioner for purposes of concluding that they both ought to be treated alike. Of course, it is unnecessary for the Board to detail, as counsel for the intervener took pains to demonstrate, that the law professor, in the same manner as the practitioner, in having recourse to law reports, law journals, etc. deals with "the stuff of the law." In this light, therefore, the Board is asked to conclude that the law professor, while engaged in teaching, is employed in a professional capacity. Or, alternatively, the assertion is made that it is unnecessary for the law teacher to be engaged in the practice of law in order that he be deemed by this Board "to be employed in a professional capacity."

9. Counsel for the applicant argued quite forcefully that the phrase "employed in a

“professional capacity” in section 1(3)(a) was intended to restrict, and not to broaden, the criteria for the exclusion of designated professions from the operation of the Act. For example, it was not intended that a member of the profession who is entitled to practice in the Province but who is employed as a cab driver be excluded from the operation of the Act. Of course, the intervener would most likely agree, given the function of driving a cab, would not be integrally connected with or appropriate to the practice of law. Nonetheless, the applicant submits that being engaged in the practice of law and being employed in a professional capacity are not to be viewed as being disjunctively separate but are to be treated integrally together. Without being employed as a barrister or solicitor (i.e., the practice of law) it is asserted that the law professor cannot be deemed to be employed in a professional capacity. Rather, he is employed as a teacher whose qualifications for the position amongst other criteria may or may not require that he be admitted to the Bar. Mr. Sack in paying tribute to one of the foremost law professors in Canada, namely John Willis, indicated that he was never qualified to practice law. Qualification for the Bar, although helpful, is not a significant factor in assuming the position of law professor at the Osgoode Hall Law School. Indeed, the evidence indicates that Dean Arthurs, upon representation to him by faculty members, rejected a proposal whereby the university would assume the burden of payment of their annual Bar fees. A reason given for the proposal’s rejection was that membership in the Bar was unnecessary in the performance of their teaching and research functions. Mr. Sack also reminded the Board for purposes of placing the intervener’s submissions in their appropriate perspective, of the fact that 25% of the faculty were not members of the Bar.

10. In sum, the applicant submitted that we ought not to view the law teacher as a professional employee in the sense contemplated by section 1(3)(a) of the Act. To the extent that the university teacher is generally treated as “an employee” so ought the law professor. Mr. Sack conceded that he perceived a difficulty with respect to the employment status of the Director of The Parkdale Legal Aid Services and the Supervisor of the “CLASP” project. He simply asked the Board to wrestle with the problem as best we can. But insofar as the other professors were concerned it was suggested that the phrase “employed in a professional capacity” ought to be read to restrict the exclusionary thrust of section 1(3)(a) by requiring the member of the Bar who is entitled to practice law be employed in that capacity.

11. The Board accepts the trade union’s argument that the law professor, except insofar as he is assigned the duties of Director of The Parkdale Legal Aid Service and of Supervisor at the “CLASP” project, is not employed in a professional capacity contemplated by section 1(3)(a) of the Act. That is not to say, however, that we disagree with the premise of Mr. Brown’s submission that law teaching, and therefore the law teacher, are an integral part of or appropriate to the legal profession. Nevertheless it does not logically follow, because of this, that the law professor thereby ought to be deemed to be employed in a professional capacity for purposes of the Act. The primary or the foremost function of the law teacher is to apply the pedagogical skills necessary to impart the subject matter of the law and the analysis thereof to his students. Whether membership in the Bar and experience in the practice of law will contribute to this objective is not within our competence to provide an accurate assessment. We accept Dean Arthur’s assertion, however, as indicative of the repertoire of skills that a good teacher may hold, in addition to other qualifications, should he possess some experience in the practice of law. Indeed, such experience may be a consideration in determining salary and eligibility for promotion and tenure. But we do not agree that because the law professor is entitled to practice law in the sense of being a member of

the Bar that he necessarily is employed in a professional capacity when he is engaged as a teacher.

12. Indeed the Board can point to the judge, the arbitrator, the librarian, the legislative draftsmen and other functionaries who, through the exercise of their skills in "the stuff of the law" may be deemed for argument's sake to be just as integral or appropriate to the practice of the law as the law teacher. The judge, of course, by statute, is precluded from being a member of the Bar. But, nonetheless, the functionaries referred to are "professionals" in the widest and glibbest sense of the word. We do not hold, however, that because their expertise requires them to be knowledgeable in the law, in the sense that they must apply the law in the discharge of their duties and responsibilities, that they are thereby engaged in the professional capacity that is akin to the practicing barrister and solicitor.

13. In the past in dealing with the status of "the professional engineer" (at a time when that profession was an exclusionary designation) the Board indicated that professional status for purposes of section 1(3)(a) of the Act ought to be determined by the prevailing legislative rules and regulations incorporated in the profession's governing statute. (See: *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. June 167 at page 174.) In other words the Board, in making its exclusionary findings under section 1(3)(a) adopts the prevailing values recognized by society at large in determining the status of the lawyer, dentist, or doctor, as the case may be, to practice. Qualification to perform professional services are subsumed in the Legislature's recognition of their having attained a level of competence to justify the application of their skills in the service of members of society. *The Law Society Act* and the regulations thereto, as they may be administered by the Law Society, determine the governing qualifications of the practicing lawyer. Once these regulations have been satisfied the lawyer may hold himself out as a barrister and solicitor and thereby be *employed in a professional capacity*. The practising lawyer, in addition to being eligible for the benefits and privileges of the profession, must also assume some of its duties and responsibilities. These particular obligations in our view are irrelevant to those duties assumed by the professional law teacher upon being engaged by a law school. The practitioner is an officer of the court and must, in the service of his client, adhere to the ethics of his profession. Once he is retained to perform services for a client, a special relationship at law takes hold and is referred to as the solicitor-client privilege. During the course of practice he is subject to the supervisory jurisdiction of the Law Society which assumes some responsibility for his professional conduct through the rules and regulations approved and enforced by that Society. Moreover, *The Law Society Act* requires that the practising lawyer pay an amount to a compensation fund to relieve society from the defalcations of his colleagues, and that he acquire "errors and omissions" insurance to protect his client from prejudice because of mistakes attributable to him in the course of performing professional services. In short, a perfunctory perusal of *The Law Society Act* patently demonstrates the implications of the practice of law that clearly and absolutely sets the lawyer apart from the law professor or anyone else who earns his livelihood on the periphery of the law. But for present purposes the Board finds it sufficient to refer to the Barristers Oath to establish the essence of the implication of "being employed in a professional capacity":

"BARRISTERS OATH:

You are called to the Degr e of Barrister-at-law to protect and defend
the rights and interests of *such of your fellow-citizens as may employ you*.

You shall conduct all cases faithfully and to the best of your ability. You shall neglect no man's interest nor seek to destroy any man's property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably founded, nor shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice any man, but in all things shall conduct yourself truly and with integrity. In fine, the Queen's interest and your fellow-citizens you shall uphold and maintain according to the constitution and law of this Province. All this you swear to observe and perform to the best of your knowledge and ability. So help you God."

(Emphasis added)

14. Dean Arthur's rejection of the law faculty's proposal that the respondent pay the annual membership levy charged by the Law Society as superfluous or unnecessary to their teaching duties assumes critical importance. Indeed, the Board is of the view that the law teacher, even to the extent that he may be a member of the Bar, is not intended to be identified with the practising profession. That is not to say that his function as a teacher is not important to the development of the qualified lawyer. For example, the intervener's reference to the law professor's appointment to The Advisory Committee appropriately characterizes the teacher's role. The law teacher, along with the other appointees to the Committee, are perceived as being detached from "the legal profession" in order that recommendations, from their particular perspective, may be applied for the express purpose of improving the service provided the public by the practising Bar. The law teacher, although he may clearly be an expert in a particular legal discipline, is viewed in this particular context as being set apart from the legal profession by the very statute that governs the status of the practising member in society at large. We cannot conclude, in having regard to the realities of the law professor's position as teacher, that this particular function, whether or not he be a member of the Bar, establishes any claim to "professional" status as contemplated by the Act.

15. Moreover the Board does not wish to be seen to blur the plain meaning of the phrase "employed in a professional capacity" as perceived by the Legislature in enacting *The Law Society Act*. Nevertheless, the Board must also weigh the relative weight of the parties' submissions of the law professor's status from its industrial relations perspective. The Board has discussed the remedial aspect of The Labour Relations Act in the many decisions where we have been required to deal with the dilemma of whether the alleged managerial person ought to be excluded from the bargaining unit under section 1(3)(b) of the Act. Those discussions will not be repeated here. (See particularly *The Ajax-Pickering Hospital Limited case*, [1969] OLRB Rep. Feb. 1183.) Nevertheless, we perceive the Legislature's rationale for excluding doctors, dentists, lawyers, etc. from the operation of the Act as attributable to their compulsory membership in self regulatory professional associations that govern their conduct in servicing society. The quality of the performance of their service, the amount of their tariff, the code of ethics adhered to by them are governed by these professional associations. For these apparent reasons the Legislature in its wisdom has concluded that the designated professionals set out in section 1(3)(a) are to be considered without the need of trade union representation.

16. On the other hand, law teachers are in the clearest and most parochial sense

engaged in a master-servant relationship *vis-a-vis* the university, with respect to the performance of and remuneration for their teaching functions. Whether he be admitted to practice or not, his terms and conditions of employment are determined through the vehicle of individual negotiation. Although some faculty members (if not a majority) of the law school may very well prefer to retain this *status quo*, nonetheless, from the perspective of the purposes of The Labour Relations Act, they are just as much a part of the design of collective bargaining as their colleagues employed in other faculties throughout the university. Indeed, the uncontraverted evidence shows the law faculty to have identified their economic interests under the umbrella of YUFA representation in their efforts to engage the respondent in bargaining with respect to terms and conditions of employment. The posture assumed by the law faculty and supported by the evidence shows them to be dissatisfied, not with the process of collective bargaining *per se*, but with the efficacy and the quality of representation their particular group has been receiving. More will be said about this in another facet of this case but, for present purposes, the Board is satisfied, having regard to both the evidence and the law, that the law professor, whether or not he is a member of the Bar, is not employed in a professional capacity and therefore ought to be treated as an employee for purposes of the Act.

17. The Board finds that the status of the Director of The Parkdale Legal Aid Service and the Supervisor of the "CLASP" project should be treated apart from their colleagues engaged principally as teachers. The purpose of these two programmes is to provide legal services to citizens who are without means to retain counsel. The programmes are administered jointly by the Law Society and the Osgoode Hall Law School. Students, as a part of their course programme, may participate in the representation of these clients in extending legal services so long as the student operates at all times under the supervision of a qualified lawyer licenced to practice in the Province. Both the Director in The Parkdale Legal Aid Service programme and the Supervisor of the "CLASP" project fulfill these functions. They are engaged by the respondent as law professors at the law school and a portion of their teaching responsibilities entail that they supervise the legal aid programmes referred to. We are of the view that the professors, while they perform these supervisory functions, are engaged, as a necessary condition of their employment, as lawyers required to be employed in a professional capacity. Their status is akin to that of a practising lawyer who has assumed the responsibility of supervising an articling student. The prime purpose of the programmes, from the students' viewpoint, is to allow him the opportunity of acquiring practical experience while at law school. Responsibility (and all the implications attached thereto) for the type of service the students provide falls upon the shoulders of the supervisors of the programmes. In this sense, the supervisor clearly assumes a solicitor-client responsibility and, as such, must be seen to be employed, in addition to his regular teaching functions, in a professional capacity. (See, for example, section 50 of *The Law Society Act* prohibiting persons other than members in good standing from acting as a barrister or solicitor.) The Board therefore finds that the Director of The Parkdale Legal Aid Service and the Supervisor of The Community Legal Advice and Services Project ought to be excluded from the bargaining unit by reason of section 1(3)(a) of the Act.

18. The Osgoode Hall Law School at York University possesses a rather unique history that distinguishes it from the typical professional faculty of other universities throughout the Province. The Osgoode Hall Law School in a fundamental sense is the product of an evolutionary process of legal education whose origins preceded the conception of York University itself. To the extent that it may be relevant to the issue of the community of interest

of the members of the law faculty, with the all-faculty bargaining unit heretofore determined to be appropriate by the parties' agreement, it may serve some useful purpose to refer to Dean Arthurs' brief synopsis of that evolutionary process given in evidence:

"In the 1950's the Law School operated under the aegis of and in the premises of the Law Society of Upper Canada at the corner of Queen and University. The Law School at that time had a monopoly of securing the admission of people to the Ontario Bar, save for those who transferred from other provinces and were already members of the Bar in those provinces; that is to say, everyone who wanted to be admitted had to be a graduate of the Law School. At the time in the early fifties the program consisted of two years of fulltime instruction, a third year of articles and a final year, a fourth year, which was comprised, about half-and-half, of instruction and service under articles. In the late forties the University of Toronto Faculty of Law was established, and during the course of the fifties, any graduate of that faculty, or indeed anyone with a Law degree from another province, was given some credit towards the call to the Bar, but in effect, had to enrol at Osgoode and complete the Osgoode program. They, therefore, upon completion obtained the degree of Barrister at Law. As I said, anyone who wished to be called to the Bar of Ontario had to be a graduate of the School, and upon graduation you received the degree of Barrister at Law, and that arrangement continued until 1957, when an understanding was arrived at between the Ontario Universities and the Law Society, pursuant to which all universities who were then in the field and others who came along subsequently were permitted to offer a three-year course leading towards the LL.B. degree. The Osgoode Hall Law School likewise converted to a three-year program, leading to the LL.B. degree. Graduates of any Law School thereafter completed, at that time, fifteen months of articles and a six-month Bar admission course and upon completion of those two requirements the graduates were called to the Bar, so Osgoode Hall Law School, at that point came to resemble the other Law Schools in the province which, indeed only – save for the U. of T. – only came into existence in the period between 1957 and about 1960. The Law School continued on this basis from 1957 through until July 1, 1968, when it formally became affiliated with York University. That affiliation resulted from negotiations which commenced on March 17, 1965; I believe a draft agreement was concluded in the Fall of 1966, to become operative July 1, 1968, at which time it was anticipated that we would occupy this building. As it turned out, the building wasn't ready and it was not, in fact, occupied until June of 1969, but the formal affiliation date was July 1, 1968.

19. The relevant provisions of "The Affiliation Agreement" dated October 15, 1965 referred to in Dean Arthur's discourse effectively transferring The Osgoode Hall Law School from the downtown Metropolitan Toronto environment to the York University campus, reads as follows:

Co-operation of Parties

4. York will use its best efforts to uphold and advance the standards of legal education heretofore maintained at Osgoode and to continue the traditions of Osgoode. To this end York and the Law Society agree during the period from the date of this Agreement to the 1st day of July, 1968 to co-operate with respect to all matters relating to legal education to be provided at Osgoode-York and to consult together with respect to all major matters relating to the administration of Osgoode-York. Without limiting the generality of the foregoing the Law Society and York shall co-operate in all matters affecting the affiliation and in particular shall consult together in respect of purchasing policies and the standardization of operating procedures prior to the affiliation date.

Academic Staff

7. York agrees to offer appointments effective on the affiliation date at Osgoode-York to all members of the faculty of Osgoode who were members thereof on July 1, 1965 and to all members who with the prior approval of York, are appointed to the faculty of Osgoode during the period from July 1, 1965 to the affiliation date. Such offers shall be made forthwith in the case of the members of the faculty of Osgoode as at July 1, 1965 and as soon as practicable in the case of all subsequent appointments. In all cases the basic academic salary, rank and conditions of tenure to be offered by York will correspond to those prevailing at Osgoode on June 30, 1968; provided that for such purposes any promotions or increases in salary effected during the period from July 1, 1965 to the affiliation date which were not before the granting of the same approval by York shall be disregarded. Such offers shall be open for acceptance in the case of other members of the faculty until July 1, 1967 and for a period of three months from the respective dates of the offers of in the case of persons appointed to the faculty of Osgoode after July 1, 1965.

From and after the affiliation date all members of the Faculty of Osgoode who accept appointments at Osgoode-York shall be eligible for increments in salary and promotions on the same basis as is applicable to members of other faculties of York, with service at Osgoode counting as if it had been service with Osgoode-York.

Privileges of Academic Staff

8. York is cognizant of the conditions of employment of faculty members in university law schools in Canada and agrees to use its best efforts to offer comparable benefits at Osgoode-York, especially with regard to salaries, pension, benefits, starting ranks, rates of promotion, tenure of office, hours of teaching, consulting work and leaves of absence. York agrees that the members of the Faculty of Osgoode-York shall be entitled to all the rights and privileges, including membership in the Senior Common Room at York, athletic privileges and dining privileges, enjoyed from time to time by members of the other faculties of York, *it being the intention of this Agreement that Osgoode-York shall be in every way a faculty of York with all the rights, privileges, entitlements, perquisites and obligations pertaining to a faculty thereof.* York agrees to use

its best efforts to maintain at Osgoode-York a ratio of faculty to students of not less than current from time to time in other *leading law schools* in Canada and to provide and maintain for the Faculty of Osgoode-York the level of administrative and secretarial assistance, exclusive of research and other special assistance, available at Osgoode at the date of this Agreement."

(Emphasis added)

20. As of the date of the filing of the instant application, the Osgoode Hall Law School, to all intents and purposes, was absorbed and integrated as part of the York University academic community save and except with respect to its peculiar relationship as a professional faculty whose roots were preserved in "The Affiliation Agreement." From an administrative view, Osgoode Hall's budgetary resources, inclusive of faculty salaries, are derived from the same source as other faculties. The Law School has its own building on campus and space is primarily allotted for use by the law faculty although other faculties are permitted to use the building once the Law Faculty's needs are attended to. Student tuition fees are payable to York University irrespective of the faculty he is admitted to. Osgoode maintains a separate admissions officer with its own Registrar, as does the School of Graduate Studies and the School of Administrative Studies. Support and janitorial staff are hired through the respondent's Central Personnel Agency and are allocated to assigned sectors of the University. Secretarial and clerical employees may be interviewed by an administrative official from the faculty to which the candidate for employment is intended to be assigned. A central office maintains student records but Osgoode maintains a separate file for each student separate from the central agency's.

21. Faculty members at Osgoode Hall are represented on the Senate and participate in the many facets of decision making involving the determination of the academic values of the university. Since the affiliation of the Osgoode Hall as a faculty of York University they have been represented in informal collective bargaining by the applicant trade union in the negotiation of their terms and conditions of employment. Fringe benefits such as sabbatical leave is uniformly applied throughout the faculties of the university. Hiring procedure is also uniform and subject to the monitoring influence of the President in his capacity as the executive arm of the Board of Governors. Salaries are established on a campus-wide basis for classifications within the faculty hierarchy. Law professors are paid no higher or no lower than other faculty members throughout the university, having regard to the classification they may occupy. The academic year for the law school is approximately two weeks longer than the normal arts and sciences courses. Academic loading is determined at the faculty level and may vary from school to school within the university. Merit pay is determined by the President of the university and allocated in accordance with a formula determined by his office. The criteria for tenure and promotion differs with respect to the law professor when compared to professors in other faculties. Nonetheless, the differences are recognized and accommodated within the criteria established and approved by the Board of Governors.

22. The Law School building is situated on the campus of the university and through a network of tunnels and passageways is connected to other faculty buildings. A law library is located at the law school and is maintained separately and apart from the university library system. Recreational and social facilities on campus are shared by all professors irrespective of faculty. A senior common room located in the law school building is open to the

university professors irrespective of faculty. A number of courses involving cross appointment of faculty between the Law School and the Faculties of Administrative Studies and Environmental Studies is arranged in co-operation with the affected authorities. Professors at the Law School, in addition to their regular teaching and research duties, engage in extra-curricular functions that allow them to supplement their incomes. Such extra-curricular activities are also engaged in, when circumstances permit, by professors assigned to other faculties.

23. Differences between the law professor and the professor associated with other faculties appear to be focused upon the separate identity of the professional faculty member and his liaison with the legal community outside the university campus and symbolized by the controlling and supervisory influence of the Law Society. The "Affiliation Agreement", to a great extent by intention, entrenches the distinctions that are designed to maintain the traditions of the Osgoode Hall Law School as perceived from its historical origins. And we are reminded by counsel for the intervener that the Law School remains the only professional faculty on campus. For example, the law student is not a member of the campus student association but presumably constitute their own self governing association. Osgoode Hall graduates have their own alumni association that is not identified with the general university graduate alumni association. Insofar as the Osgoode Hall Law School functions as a professional faculty it indeed, in many aspects of its operations, maintains contact with other law schools and as well as with the legal profession. Therefore many of the extra-curricular programmes initiated by the Law Faculty for the purpose of the development of the law student contribute to the alienation of the Law School from its general intercourse with the university community as a whole.

24. But aside from this functional separation of the law school the evidence, particularly that of Mr. Farr, the academic vice-president of York, indicated that notwithstanding the uniformity of working conditions of all members of the university faculty, the respondent in making its decisions affecting faculty members generally must be conscious of its obligations to the Law Society assumed in the Affiliation Agreement. The evidence established that the law faculty before affiliation carried on a rudimentary form of collective negotiations with the Law Society with respect to terms and conditions of employment. This distinct faculty representation was continued after the affiliation by virtue of the appointment of a law professor to YUFA's negotiating committee. Difficulties arising out of YUFA's failure to negotiate salary settlements with the respondent university designed to maintain parity with salaries paid faculty members of other law schools and to keep pace with the salaries paid the practitioner of equal experience, are said to emphasize the law professor's lack of identity with the interests of other professors. For example, recently hired law professors are paid in excess of a recently hired professor in other faculties by placing the former in a higher category. Leave of absence on the terms allowed before the Affiliation Agreement were maintained by York under terms of the Affiliation Agreement. And the Board has already mentioned that criteria for promotion and tenure is substantially different although appropriately recognized by the university administration. That is to say, the law faculty adopted a formula of "three years and out" whereas the formula applied throughout the university is six years before a professor becomes eligible for tenure and, should he not succeed, he could still retain a teaching post. It was also pointed out that progression through the salary classifications was expedited for the law professor whereas this was not generally the case for other faculties.

25. The issue emphasized by the intervener during the course of the proceedings that demonstrated the lack of community of interest of the law professor with the all-faculty bargaining unit was the problem of resolving pay differentials having regard to what was referred to us as "external anomalies". At the outset of the bargaining negotiations in 1974 representatives of the Law Faculty complained both to York University (through Dean Arthurs) and their bargaining agent, YUFA, that Osgoode faculty salaries based on past settlements were not keeping pace with the salaries paid law professors in other schools and were falling behind their reasonable expectations relative to the practicing profession. Indeed, it was suggested that a number of the more experienced and established members of the faculty quit the law school because of the deteriorating salary situation. This dilemma, in addition to the difficulties encountered in attracting able replacements induced the law faculty to take corrective measures. The Law Faculty through its organization, i.e., the intervener, initially proposed that they opt out of the faculty-wide bargaining that hitherto had been the accepted practice. Nevertheless, as a result of negotiations with the YUFA executive, representatives of the intervener succeeded in making their point and a compromise was reached. That is to say, and notwithstanding the serious reservations expressed by the YUFA executive, the Law Faculty was to continue to remain under the umbrella of YUFA representation for purposes of the negotiation of their terms and conditions of employment, inclusive of salary. Representatives of the Law Faculty were to be allowed to negotiate unilaterally with the respondent an amount of money over and above the general salary settlement to be paid to incumbent members of the faculty and this sum was to account for the "external anomalies" complained of. The original request in satisfaction of these "external anomalies" was for a payment of \$3,000.00 per professor over and above the salary determined after YUFA settled its negotiations. Ultimately, the law professors fell short of their request by \$500.00 once the respondent had agreed to pay an amount equal to 1% of the YUFA salary settlement.

26. Serious problems between YUFA and the Law Faculty arose after the compromise over "external anomalies" had been reached. At first concerns were expressed by YUFA should the 1% set aside for the external anomalies fund be computed as part of the overall university wide settlement. YUFA was anxious that the amount not be calculated in this manner in order to inhibit misleading impressions that could be prejudicial to future negotiations. Then a motion was put forward at a YUFA executive meeting proposing that the fund set aside for external anomalies not be distributed to individual members of the Law Faculty. Rather, it was proposed that a committee be constituted with a view to allocating the monies to professors at the base of the salary scale throughout the university. This particular motion was defeated by a majority of the members comprising the YUFA executive. Nonetheless, the concerns of the law professors with respect to the ultimate destination of these funds soon found expression. And as events unfolded these concerns were not unwarranted. At the ratification meeting attended by a small number of professors the settlement negotiated between the university and YUFA's bargaining committee was conditionally ratified. The major condition attached to the ratification of the contract was that the monies set aside for external anomalies be distributed by a committee constituted for that purpose to modestly paid professors irrespective of faculty. The law professors clearly viewed this turn of events as "a reneging" by YUFA of their compromise arrangement.

27. Following the ratification meeting, the Acting President of the University, Mr. John Yolton, summoned the representatives of the participating parties to his office for a meeting. The evidence disclosed that "heated" discussions ensued. The upshot of the delib-

erations was that the President convinced the parties that he viewed the anomaly fund as the preserve of the administration and was not subject to the decision making processes of YUFA. Moreover it was concluded that the monies set aside for external anomalies were to be distributed as originally intended. In other words, the law professors each received an anomaly premium of \$2,500.00. Afterwards no mention of the dispute was raised by YUFA Members and the agreement was thereby concluded. Since this incident the law professors apparently have continued their association with YUFA for bargaining purposes up until the filing of the instant application for certification in December, 1975.

28. Counsel for the intervener argues that the law professors ought to constitute *per se* an appropriate bargaining unit separate and apart from the all faculty unit. It is submitted that the law professors do not share a community of interest with faculty members attributable particularly to their "professional" concerns as teachers of the law. The professor's loyalties to his academic pursuits within the university are said to compete with his responsibilities in training students in their future dealings with the outside community served by the legal profession. Moreover, the suggestion is made that the Board ought not to apply to academic communities criteria normally used in determining the appropriateness of the bargaining unit in "industrial models." The university setting is a distinctive experience that should be approached by the Board with a fresh viewpoint. Analogy is made to section 6(3) of the Act where the Legislature has preserved the status of the professional engineer to determine at his option whether he is to be represented for collective bargaining purposes in a separate bargaining unit apart from an all-employee unit. The Board is asked to apply the same rationale in its treatment of the law professor and direct a vote amongst them to determine their desires with respect to representation in an all-faculty unit. In this respect, counsel placed heavy reliance upon the American jurisprudence which, to all intents and purposes, recognizes a potentially distinct community of interest shared by professional faculties on a multi-university campus, thereby justifying the type of conclusion urged upon this Board. (See: *The Catholic University of America and Law Faculty Bargaining Committee* 1973 CCH NLRB ¶ 25,067; *University of Miami Chapter, American Association of University Professors, et al* 1974-75 CCH NLRB ¶ 15,036; *University of San Francisco and Associated Law Professors of the University of San Francisco School of Law* 1974 CCH NLRB, ¶ 26,004; *New York University and New York University Chapter, American Association of University Professors, et al* 1973 CCH NLRB, ¶ 25,587; *Fordham University and American Association of University Professors, Fordham University Chapter, et al* 1971 CCH NLRB, 23,473.)

29. The leading case establishing the policy of the National Labour Relations Board in dealing with the appropriateness of the professional faculty members' inclusion in a comprehensive unit was *The Syracuse University and The Syracuse Chapter, American Association of University Professors* case, 1973 CCH NLRB, 25,517. In emphasizing the significant difficulties of applying industrial norms to the appropriateness of including the law professor in an all employee unit, the NLRB focused upon the professors' peculiar allegiances to his professional pursuits both inside and outside the university community. In doing so, the Board concluded that these parochial professional concerns, notwithstanding the relatively identical economic interests of the law professor with those of his colleagues in other faculties, ought to be recognized and accommodated in determining whether he should be treated as appropriate for inclusion in the all faculty bargaining unit. The solution reached by the NLRB was in extending the law professor the opportunity of deciding, through a vote, if he wished to be represented for collective bargaining purposes in a comprehensive unit. In doing so the NLRB was satisfied that either a comprehensive unit or a bargaining

unit restricted to the professional faculty group could constitute a bargaining unit appropriate for collective bargaining. Thus the NLRB indicates at p. 32,888:

"For that reason we are forced to conclude that reliance on industrial models alone is not appropriate and cannot serve all the legitimate interests of employees in what, until recently, was terra incognita for the Act and for this Board. Because of these special interests, which have uncommon importance in this context, we believe we must be especially watchful in guarding the rights of minority groups whose intellectual pursuits and interests differ in kind from the bulk of the faculty. Granting a voice merely in determining whether such a group shall be swallowed up by the collective body or shall have separate representation will not answer. Rather it requires yet another choice, that of standing alone without representation regardless of the choice of the university body as a whole.

We conclude that the law faculty is such a group. Relatively small in number, oriented more closely to their chosen field than to the academic or university world, with intellectual interests more nearly aligned with those of their brethren in practice than with their academic colleagues of the faculty, it is apparent that their special interests may suffer if not recognized. The same is undoubtedly true of other disciplines, most particularly those requiring work at the graduate level to prepare for specialized areas of endeavor – as opposed to purely scholarly or intellectual pursuits. Such disciplines, more practical than intellectual, identifiable – we anticipate – by the relationship between their academic and practicing colleagues, are, at once, part of the academic world and foreign to it and of each other.

In view of the foregoing, including our conclusion that either separate university and law school units or an overall unit would be appropriate and that the desires of the law faculty are critical on this issue, we shall not make a final unit determination at this time, but shall direct that elections be conducted in the following voting groups at the Employer's campus:...".

30. The principal submission in support of concluding the existence of a separate community of interest of the law faculty, irrespective of their entrenched rights under the "Affiliation Agreement" was in counsel's reference to "the submergence theory." Should the forty law professors be included as part of an all-faculty unit they would form a "rump" faction attached to a group of approximately one thousand professors. As a result the peculiar and unique concerns of the law faculty with respect to the negotiation of terms and conditions of employment, it is argued, would inevitably conflict with the opinions of the democratically constituted majority. The particular needs of the law professor would, predictably, be frustrated. In support of this assertion reference was made to the crisis of the past bargaining episode over the establishment of the "anomaly fund" designed for the adjustment of the law professors' salaries to conform with the dictates of the prevailing market. The dangers inherent in an all-faculty unit were demonstrated by the alleged "reneging" by YUFA of its arrangement to permit the law faculty to negotiate a separate agreement for

"external anomalies." It was attributable to the intervention and direction of the President of the University that prevented the funds from being usurped and applied for other than their original purpose. In sum, counsel submits that even though the YUFA executive may very well have recognized the distinct and separate needs of the law faculty, the applicant by virtue of its demographic composition was incapable of responding to those particular needs.

31. Counsel for the applicant simply argues that the Board ought to adhere to our practice of refusing to contribute to the fragmentation of bargaining units by separating the law faculty from a comprehensive all-faculty unit. (See: *The Board of Education for the Borough of North York*, [1970] OLRB Rep. Dec. 915). Moreover, in past cases professional faculties, including law, have been included in Board certificates in all-faculty bargaining units determined, albeit on agreement of the parties. (See, for example, *The University of Windsor* case, [unreported] Board File No. 1867-76-R; *The University of Ottawa* case, [1975] OLRB Rep. Sept. 694 at 698.) There is no basis, in counsel's view, for departing in this case from our long standing practice of including all employees, whatever their parochial affiliation as professionals, from an all encompassing bargaining unit. (See: *The Stratford General Hospital* case, [1976] OLRB Rep. Sept. 459, at 503.) Indeed, in a recent case involving the respondent university the issue of the appropriateness of including "EDP" technicians in a comprehensive support staff unit, the Board made these telling remarks in *The York University* case, [1975] OLRB Rep. July 554 at 557:

"7. In applications for certification involving employees engaged in university settings the Board has expressed its concern with respect to bargaining units that may lead to a proliferation of bargaining units that could otherwise be encompassed by one global unit. In other words the Board's disposition in such applications is to avoid undue fragmentation of bargaining units. (See for example: *The York University Case* O.L.R.B. M.R. April 1974 240 and the *McMaster University Case* O.L.R.B. M.R. February 1973 102). In this regard it is of some interest to note that this policy has been adopted by Boards in other jurisdictions. (see for example *The Simon Fraser University Case* 75 C.L.L.C. ¶16,145 [BC] and the *Board of Governors of Mount Royal College* 74 C.L.L.C. ¶16,120[Alta]). For the Board to depart from these policy considerations we would have to be satisfied by compelling evidence that a particular group of employees do not exhibit any functional interdependence with employees who would otherwise be included in a wider unit. In this respect from an operational perspective we cannot conclude that the "EDP employees", particularly the key punch operators and the data control clerks, function autonomously and apart from secretarial and clerical employees engaged by the respondent university. From the standpoint of peculiar skills and particular working conditions the disputed employees are not sufficiently distinguishable from the balance of the employees in the proposed unit to justify their exclusion. The inevitable consequence of the objectors position would compel the Board to separate a variety of the other classifications of employees, such as laboratory technicians, who because of the peculiar features of their job duties, would be entitled to independent representation in a separate bargaining unit. In this respect the Board has often

stated that the mere exercise of professional or technical skills in the performance of an employees' job will not in itself justify separate recognition for purposes of collective bargaining (see *The Niagara Regional Health Unit Case* O.L.R.B. M.R. April 1975 376, *The Essex Health Association Case* O.L.R.B. M.R. November 1967 716, *The East York Public Library Case* O.L.R.B. M.R. March 1971 120). We are not persuaded therefore that the special skills required by programers in the performance of their duties justify treating them any differently for collective bargaining purposes from the support staff upon whom they are both functionally dependent and operationally integrated."

32. Counsel also referred us to decisions made in other Canadian jurisdictions where the issue of the status of professional faculty members on campus were litigated and ultimately determined to be appropriately included in the comprehensive unit. For example, in *Syndicat des Professeurs de la Faculte de Droit de l'Universite Laval v Syndicat des Professeurs de l'Universite de Laval, et al* case, 76 CLLC ¶14,054, the decision of the investigation commissioner to include the law faculty members in an all faculty unit at Laval University was upheld on review before the Quebec Labour Court. In that case the headnote reads as follows:

"...In its decision the Court was guided by the principle that it was not conducive to the establishment of stable labour relations or orderly collective bargaining to subdivide a well-established unit of employees. Where this was attempted, convincing grounds had to be advanced. In this case the appellant had not produced sufficient evidence to warrant a finding that the proposed unit was more appropriate for collective bargaining purposes. Although the law faculty had its own characteristics as far as working environment and pay scales were concerned, its professors performed similar tasks and had similar bargaining interests to those of other university professors."

33. Counsel for the applicant distinguished, with some degree of accuracy, the American jurisprudence by demonstrating that in those cases the intervening law faculty applied for bargaining rights on behalf of its members. In our case, the intervener has indicated an intention to apply for certification if it should fail to persuade the Board of its "professional" status. It is appropriate to note, however, that counsel for the intervener advised the Board that to all intents and purposes his clients preferred to remain unrepresented for collective bargaining purposes and would seek certification with a view to frustrate any attempt by YUFA or any other trade union from capturing bargaining rights on their behalf. The applicant argues, notwithstanding the shortcomings attributable to the numerical composition of the bargaining unit, should the law faculty be excluded they would continue to remain vulnerable to the arbitrary whims of the respondent employer in the negotiation of their terms and conditions of employment. Notwithstanding the unfortunate incident of the past relating to the external anomalies fund, the faculty of law, it was asserted, would still be better off remaining under the umbrella of YUFA representation. In accordance with the accepted criteria applied by the Board in its jurisprudence, there is no basis for the exclusion of the law faculty. And counsel detailed the reasons why the Board ought to apply those guidelines to the particular facts of this case. In the last analysis, however, the law professor is not so different from other faculty members, despite the strained attempts

by the intervener to demonstrate the contrary, in that he is fundamentally engaged in pedagogical pursuits. It therefore follows that in absence of convincing reason, the law professor ought to be found to share the same pragmatic concerns as other faculty members composing the academic community of the university and be included in the appropriate unit. (See, for example, *The Brockville General Hospital case*, [1967] OLRB Rep. January 776 at p. 780, where no justification was found for splitting registered and graduate nurses engaged as teachers from a comprehensive hospital bargaining unit composed of graduate and registered nurses.)

34. Moreover, the applicant suggested that the issues raised as a result of the incident over the "anomalies fund" is basically the type of discord that is common to internal union politics. The evidence does not support a finding that "YUFA" reneged upon any undertaking extended the law professors. Rather the dispute once it surfaced was resolved to the satisfaction of all parties after a meeting with the university President. The clear and unequivocal proof of the settlement of the issue without prejudice to any party was in the subsequent behaviour of the law professors who continued their association with YUFA. Indeed the law professors participated in the negotiation of the collective agreement that preceded the circumstances giving rise to YUFA's application for certification. In short, it is urged that the Board place the "anomalies fund incident" in its proper perspective and not upset its traditional policy of determining the appropriateness of the bargaining unit on the basis of its normal policy guidelines.

35. This is the first university application involving faculty members where an attempt has been made to separate a department, or classification, from an "an all faculty bargaining unit." Counsel for the applicant has presented the Board, based on our normal policy considerations, with a strong, arguable case in support of declaring the comprehensive bargaining unit appropriate. But these considerations are recognized by the Board to have been based upon concerns for "industrial models." We agree that there is much merit to Mr. Brown's suggestion that the Board ought not to treat criteria established in the industrial sector as necessarily binding with respect to the determination of the appropriate unit involving faculty members employed by a university of the size and diversity of the respondent's. The Board's preferences for the comprehensive unit, particularly as in the present case, where equally compelling arguments can be made to justify either of the two units proposed, is clearly established and needs no additional documentation. Indeed, Mr. Sack has provided the Board with precedents from other Canadian jurisdictions to demonstrate the propriety of including the law professor with the other professors on the campus of a university. (See, however *The University of Manitoba Cases* File No. MLB-2932, #430-76-IRA, #U-10-64, #U-10-63, where separate recognition was given professional and semi-professional faculties on the campus of The University of Manitoba.) The Board, based upon our general disposition of treating the more comprehensive unit as most likely to contribute to viable collective bargaining, would require compelling reasons for departing from that posture. And in this context, the Board views with some significance, in reaching a conclusion, the combined objective of the Affiliation Agreement of integrating the law faculty with the total university community and, at the same time, retaining the distinctive traditions of The Osgoode Hall Law School.

36. Bearing these considerations in mind, the Board must deal with the issues raised by the intervener in the development of its submergence theory. There is no dispute that the law faculty has established some basis for asserting that in being engaged in the teaching of

a professional discipline it shares a distinctive relationship with the legal profession outside the academic community. Indeed the law faculty, unlike The Arts and Sciences Faculty, enjoys both the isolation inherent in being an integral part of an academic community and the worldliness of being responsive to the dictates of The Law Society and the outside community that the law profession must serve. The introduction of "The CLASP Project" and "The Parkdale Legal Aid Service" as part of the course curricula of the law student almost symbolizes the dual allegiance owed by members of the Law Faculty.

37. This duality has manifested itself in more pragmatic terms over the dispute arising out of "the external anomaly fund" incident. Where the balance of the faculty members employed by the respondent were resigned to adjust themselves to a salary settlement arising out of the negotiations for the 1974 agreement that amounted to a 4% per annum increase, the law professors complained that the effect of this was to cause them to fall behind salaries paid professors in other law schools and to fail to keep pace with the salaries paid lawyers of like experience in private practice. The result of this phenomena allegedly caused the law school difficulties in attracting candidates for teaching positions of the calibre of those who had quit Osgoode Hall for more lucrative career opportunities. Whether the law professors were right or wrong in their assessment of the effectiveness of YUFA's capabilities to bargain on their behalf, they succeeded in convincing the respondent university and the YUFA executive of the legitimacy of their position. We are quick to emphasize that no evidence has been adduced before this Board that justifies the conclusion that the YUFA executive reneged on its arrangement with the law faculty. On the contrary, the YUFA executive is shown to have defeated a motion by its dissident members to apply that fund for other purposes. The difficulties presented to the executive as perceived by the Board were the problems raised in explaining and convincing their constituency to support its arrangement made with members of the Law Faculty.

38. Mr. Sack patently underplays the seriousness of the dispute when he suggests it was settled to the mutual satisfaction of the parties at the meeting arranged by the President of the respondent university. To the contrary, the President is shown to have imposed the distribution of those monies as originally earmarked by the design of "the external anomalies fund". We have concluded that the dispute over the external anomaly fund has raised serious reservations as to the appropriateness of the law faculty's inclusion in an all faculty unit. The dispute itself in that it is related, by its inherent nature, to the fair remuneration of the law professor having regard not only to the prevailing rates paid other professors on York's campus, but also to other external factors peculiar to the law professor was clearly an issue intrinsic to the process of meaningful collective bargaining. The applicant was given the opportunity to demonstrate its capacity to truly represent all professors irrespective of faculty in a comprehensive unit having regard to its recognition of the legitimate entitlement of the members of the law faculty to the proceeds of the external anomaly fund. The sorry conclusion suggested by the membership's resolution at the ratification meeting was that YUFA could not respond to those particular needs. As a result the YUFA executive, a body authorized to undertake obligations on behalf of the organization, could not fulfill its undertaking made to the Law Faculty.

39. A premium of \$2,500.00 was ultimately paid to each law professor out of the external anomalies fund. Of that there is no dispute. But we are satisfied that they were paid only because of the overriding powers of the President. Had YUFA been the certified bargaining agent acting on behalf of an all-faculty bargaining unit, we would have grave reser-

vations of the President's prerogative to have unilaterally imposed a settlement of the anomalies fund dispute. (See section 59(1) of the Act.) Indeed, had YUFA been formally established as the legitimate bargaining agent of an all-faculty bargaining unit, we have doubts as to whether the faculty agreement ultimately negotiated would have been settled without recourse to industrial strife. In short, through the fortuitous circumstance of a bargaining experience that preceded the filing of the instant application, the intervener has been able to demonstrate the lack of a community of interest of the law professor with the balance of the faculty members of the York University campus.

40. The Board has indicated in the past its preferences for comprehensive bargaining units. In doing so, we have recognized that the political processes of trade union decision making often results in disappointed expectations amongst some members of the bargaining unit. The "trade offs" that are made particularly at ratification meetings are bound to create schisms within minority factions comprising the total bargaining unit. Nevertheless, it is the Board's expectation that the wider, more comprehensive unit, notwithstanding these considerations, would most likely contribute to viable collective bargaining. In the first instance, the employer is spared the expense and exhaustion of resources in dealing with potentially a multiplicity of bargaining agents; and, in the second, the employees through one exclusive bargaining agent can deal more effectively in bargaining with the employer on a common front. For these reasons, the Board usually requires sufficient cause for departing from our disposition to follow our preferences.

41. In the particular circumstances related to the Board in the instant application, we have been satisfied that the members of the law faculty have established a case for concluding that they do not share a community of interest with an all faculty bargaining unit. They are a recognizable cohesive group that *per se* are not likely to achieve the benefits of bargaining through the vehicle of the comprehensive bargaining unit. The peculiar status of the Osgoode Hall Law School may very well be attributable to the artificial means resorted to in grafting the Law School onto the academic community through the Affiliation Agreement. It can be perceived that although the Law School has institutionally been integrated with the university community, the organic growth that naturally holds a community together has yet, from an industrial relations perspective, to take hold. Indeed, the traditions and policies of faculty bargaining that preceded Affiliation in a *de facto* sense has established its viability by virtue of the success attained by the intervener in convincing the respondent of the justification for a salary adjustment for the law professor based on anomalies external to the university community.

42. The unique circumstances in this case have demonstrated that the Board's policy considerations with respect to defining the appropriate bargaining unit must always be applied with sensitivity to the particular circumstances of the case. The Board's guidelines for appropriateness are not intended to be mechanically applied irrespective of the factual situation before it. We are not prepared at this point to find that professional faculty members are, in all cases, not appropriate for inclusion in an all faculty bargaining unit. But the Board has been satisfied in this case that the peculiar concerns of the Law Faculty with respect to their terms and conditions of employment are not likely to be met should they be included in a global unit. The issue over the external anomaly fund has persuaded us that their interests, however legitimately maintained, are bound to be submerged when in conflict with the interests of the total bargaining unit. Issues that arise in the collective bargaining process that pertain solely to the law faculty, we suspect, having regard to their uni-

que position as the sole professional faculty on campus, may not be achieved if they are included in the all faculty bargaining unit. The Board is therefore satisfied that the law professor ought to be excluded from the bargaining unit found appropriate in our decision on April 10, 1976.

43. Having regard to the agreement of the parties, the Board further finds that all full-time faculty and full-time professional librarians employed by York University in the Municipality of Metropolitan Toronto save and except the President, Deans (except the Dean of Students of Glendon College), Associate Deans, Directors of Research Centres and Institutes, Faculty members on the Board of Governors, Director of Libraries, Associate Director of Libraries, Assistant Director of Libraries (Technical Services), Director of the Office of International Services, Faculty teaching at York University while on leave from other universities or educational institutions, Director of the Division Research and Executive Development, Director of the Department of Instructional Aid Resources, and all faculty members of the university assigned to the Osgoode Hall Law School, constitute a unit of employees of the respondent appropriate for collective bargaining.

44. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER PATRICK J. O'KEEFFE

1. I dissent in part from the decision of the majority. While I am in agreement that the law faculty at Osgoode Hall are not excluded from the operation of The Labour Relations Act, I am not in agreement with the majority conclusion that it is not appropriate to include the law faculty of Osgoode Hall in the same unit with other faculty at York University.

2. In the first place, I would point out that the only application before us is for a comprehensive unit including all York University faculty. There is no separate application before us for a unit consisting solely of Osgoode faculty. Accordingly, in my opinion, it is wrong to weigh the question whether Osgoode faculty would be better represented in a separate unit than in a comprehensive unit. The only question before us is whether a unit of faculty which includes the law faculty is an appropriate unit.

3. On this issue, the weight of reason and authority supports the view that a comprehensive unit is an appropriate unit. In the first place, the Board's policy against the fragmentation of bargaining units is well known. I do not find this policy inapplicable to the university context. On the contrary, I note that university communities in general, and the university community at York University in particular, have, entirely on their own, achieved a degree of unity that is, if anything, greater than that to be found in the industrial context. One need only point to the fact that, from the time they arrived at York University some ten years ago, the Osgoode Hall law faculty have been represented by the same Faculty Association as the rest of the York University faculty.

4. If it is contrary to the policy established by this Board to fragment a group of employees even though they have never been represented together before, it is even more repugnant to fragment them in the face of a long history of common bargaining and representation. Yet, despite this tradition and history, the majority have decided to splinter the Osgoode faculty from the rest of the York University academic community. In my view,

this decision will only serve to divide the university community and to alienate the law faculty from the rest of their colleagues. The majority impose this arrangement despite the fact that the Osgoode faculty themselves, notwithstanding their previous differences regarding salary differentials, have sought to avoid division, for the evidence indicates that, in the last round of bargaining, the Osgoode faculty were content to be represented by the Faculty Association representing the general body of faculty. Nonetheless, on the basis of the representations of a minority of the Osgoode faculty, the majority have removed the entire Osgoode faculty from the benefits of such common representation.

5. Again, the weight of authority and practice in Canada supports the inclusion of Osgoode faculty in a comprehensive faculty unit. With the sole exception of Manitoba, whose legislation differs from our own, labour boards in other provinces have refused to separate professional faculty from the rest of the university community. Most recently, separate units for law faculty were rejected at the University of Saskatchewan and at Laval University in Quebec. See 76 CLLC para. 14,054 for the cogent reasons of the Quebec Labour Court. Indeed, in our own province, the law faculty at Windsor University and the medical faculty, as well as the law faculty, at the University of Ottawa have, by agreement, been included by this Board in the same unit as the rest of the university faculty. Thus, experience, as well as authority, contradicts the view of the majority that law faculty do not share a community of interest with other university faculty.

6. Even in the United States, where strong representation has been made over the years for the exclusion of law faculty, the National Labour Relations Board has made it plain that, while a separate unit for law faculty may be appropriate, a comprehensive unit including law faculty is also appropriate. Furthermore, in the American cases which were referred to us, there were competing applications for different units. However, in this case, there is no separate application for a separate unit consisting solely of Osgoode faculty. Thus, my colleagues are driven to an extreme position, beyond that and contrary to that reached by the American National Labour Relations Board, i.e. to find that, despite the absence of an application for a separate unit of law faculty, a general faculty unit at York University, including Osgoode faculty, is not appropriate. Such a conclusion flies in the face of authority both in Canada and abroad.

7. Let us examine the results of this condition. Counsel for the intervener has indicated an intention to apply for certification if it is decided that Osgoode faculty are covered by the Labour Relations Act. However, such a statement of intention cannot have any legal significance. The fact of the matter is that the Osgoode faculty have elected not to seek separate certification. Nor can it be said that they will do so. The intervener is not a trade union and does not even have a written constitution which is a requirement of such status. The Osgoode faculty may decide that they do not wish to support a separate application for certification. Indeed, it would appear, from the representations of counsel for the intervener himself, that the only purpose of such an application would be to avoid inclusion in a general faculty unit.

8. We cannot take cognizance of a tentative undertaking given on behalf of an informal association supported by a minority of Osgoode faculty. We have to proceed on the basis that, if the Osgoode faculty are not included in the same unit with the rest of the York University faculty, they may well not be represented at all. Yet this consequence of the majority decision is contrary to the express policy of the Labour Relations Act and of this Board which is to encourage collective bargaining.

9. I find other aspects of the majority decision to be troubling. On the one hand, dealing with the question of exclusion of law faculty from the Labour Relations Act, the majority state that the implications of the practice of law "clearly and absolutely sets the lawyer apart from the law professor", that the law teacher is "not intended to be identified with the practising profession" and that "the uncontroverted evidence shows the law faculty have identified their economic interests under the umbrella of YUFA representation." Yet, in dealing with the question of the appropriate bargaining unit, my colleagues emphasize the distinctive relationship of the law faculty with the legal profession! The conclusions of the majority on the two aspects of this case are at cross-purposes. On the one hand, the majority conclude that the Osgoode faculty are not professionals under the Labour Relations Act and, on the other, they separate them from the general bargaining unit on the ground that they are professionals. In this way, they establish a separate category of employees without any legislative authority. The Legislature of this Province has seen fit to do this only with respect to professional engineers pursuant to section 6(3) of the Labour Relations Act. The effect of such an express provision for a separate bargaining unit for professional engineers makes it clear that such separation is not to be a matter of general application.

10. In doing so, the majority place great weight upon the Affiliation Agreement between Osgoode Hall Law School and York University. However, quite apart from the question whether an agreement between employers can determine the question of the community of interest of employees, this very agreement makes it crystal clear that Osgoode faculty are to receive increments in salary and promotions on the same basis as is applicable to members of the other faculties of York and that it is the intention of the agreement that Osgoode is to be in every way a faculty of York. The obligation of the University to use its best efforts to offer comparable benefits to those in university law schools in Canada is not inconsistent with the University's duty to bargain in good faith with the Faculty Association generally and, in any event, cannot affect the status of the Osgoode faculty for certification purposes.

11. Indeed, the history of Osgoode's move to York University demonstrates that a complete integration has taken place. As the majority observe, there has been a physical and administrative integration of Osgoode Hall Law School with the University. This integration extends to the collegial functions involved in university government. Dean Arthurs himself, in an article on the subject (Exhibit 6) commented that "Osgoode Hall Law School is, and has been for some years, part of the Canadian university community" and that "functionally the bench and bar play so small a role in the daily life of the school and its students that physical relocation will substantially affect neither programme, personnel, nor methods of instruction." Dean Arthurs went on to say that the "school policy in every sense will be effectively determined solely within the university structure." I find relevant, here too, the fact that, in a memorandum dated March 21, 1975 (Exhibit 41) Dean Arthurs declined to compensate Osgoode faculty for bar fees on the basis that they were "unrelated to any activity undertaken on behalf of the school." That a complete integration has taken place is confirmed by the testimony of Vice-President Farr, who gave evidence that, in matters of administration, working conditions, and participation in university government, the law faculty were scarcely different from the rest of the University faculty. While there are naturally minor variances in certain areas, as there are between other faculties, the uncontroverted evidence is that the practices at Osgoode Hall Law School are required to be within the standards and criteria established by the University.

12. Thus, in my view, the evidence completely contradicts the statement of the majority that a full integration of Osgoode faculty with the rest of university faculty has not taken place. Furthermore, the evidence does not support the view of the majority that the law faculty, insofar as they are engaged in the teaching of a professional discipline, share a distinctive relationship with the legal profession outside the academic community and, unlike the Arts and Sciences faculty, enjoy the worldliness of being responsive to the dictates of the outside community. To the contrary, the evidence is that other faculties, such as Environmental Studies, maintain contact with their own alumni as well as with professionals outside the university. I would point out that the Faculty of Environmental Studies includes architects, planners and economists who have an interest in and experience of practical activities outside the University that is in no way different from that exhibited by members of the Osgoode Hall law school. The existence of the student legal aid project and the Parkdale Legal Aid Service is an exercise in clinical education that is clearly quite different in kind from the general process of legal education. Indeed, the latter is a separate institution with a separate governing body and its own staff of legal and other personnel.

13. I am concerned by the observation of the majority that "equally compelling arguments can be made to justify either of the two units proposed." In the first place, if this is so, it is difficult to understand how it can be said that it is not appropriate to include Osgoode faculty in a general faculty unit. Furthermore, this observation indicates a misconceived approach, which underlies the entire reasoning of the majority, for it assumes that there are two competing applications, whereas only one application for an all-inclusive unit has been made. In this regard, the jurisprudence of the Board is clear that an applicant need not show that the unit it proposes is more appropriate than other conceivable units, but only that it is an appropriate unit. Of this, there can be little doubt.

14. What has apparently influenced the majority is their concern regarding the circumstances surrounding the negotiation of the 1974 salary increase by the Faculty Association. At that time the Osgoode faculty desired an additional increase to compensate for "external anomalies." In simple terms, the Osgoode faculty claimed an additional amount for salary based upon market conditions outside the University – an amount which is commonly referred to in the University as a "market differential." It would appear that, while the executive of the Faculty Association supported this request, the general membership, when the matter was considered together with the University's over-all proposals at a ratification meeting, did not.

15. In the first place, I would point out that the evidence indicates that this concern regarding market differentials is not peculiar to the Osgoode, since any faculty may, from time to time, command a higher price on the market outside the university. To some extent, this is already reflected in law faculty salaries, as it is in Administrative Studies, where the average annual salaries for the level of full professor and assistant professor have been higher than salaries for the same levels at Osgoode Hall (see Exhibit 5.) Indeed, the evidence was that the market differential obtained by the Osgoode faculty in 1974 was also extended to faculty involved in Physical Education. Are the majority then saying that, if an application for a separate unit had been made by the members of the Department of Physical Education, it would have been granted? Yet such seems to be the result of their reasoning. However, I am of the view that the concern regarding market differentials is shared by many faculty and does not isolate the Osgoode faculty from the rest of the university community. Indeed, even in the industrial context, differentials in salary based on market conditions

and particular skills, i.e., for trades, are not uncommon, though such trades are often included in comprehensive units. Nor does the record indicate any difficulty in accommodating such concerns of law faculty at the Universities of Ottawa and Windsor where the law faculty have been included in the same unit as the rest of the faculty.

16. In the second place, the majority seem to find fault with the fact that the general membership declined to approve a differential for Osgoode faculty at the ratification meeting in 1974. However, what I find to be of significance is that few, if any, Osgoode faculty attended at the ratification meeting in order to support claim. How can a complaint be made about a failure to adopt the demands of a minority when the minority itself did not attend to press those demands upon the majority? Furthermore, it does not appear that there was any lingering animosity, for in subsequent negotiations (the most recent set before the current application) the Osgoode faculty were content to be represented by the Faculty Association for bargaining purposes. In short, by separating Osgoode faculty from the rest of the university community the majority have done, on the basis of events of 1974, what the Osgoode faculty itself, following the same event, would not do.

17. What justification, then, is there for excluding the Osgoode faculty and not other faculties which may claim a market differential? It is clear from the evidence that other faculty members perform consultative or extra-curricular work in the same fashion as Osgoode faculty. Indeed, the evidence is that "over half the Osgoode faculty do no outside work whatsoever, while in the vast majority of cases that do, the income derived therefrom is extremely minimal." This much is apparent from a report of Professor Maddaugh of Osgoode Hall Law School to the YUFA executive dated November 15, 1973. (Exhibit 17.)

18. Surely, the question of market differentials involves the normal process undertaken by a bargaining agent balancing the competing claims of different groups. Whether a differential is, in certain circumstances, justified, is a matter for the bargaining agent to resolve and is not a matter which this Board can or should properly assess. There will often be internal differences and dissatisfactions amongst different groups. Indeed, this fact is recognized by the majority. There is no justification, however, the concluding, from the events in 1974 alone, that the claims of the Osgoode faculty or any other minority will always be submerged. This has clearly not been the experience at the other universities. If a claim for a market differential, justified or not, warranted a separate unit, there would ultimately be as many units as faculties. Such a course can only lead to the splitting of the entire university community. This Board encourages the strength provided by a general bargaining unit and recognizes that trade-offs must be made within that unit. This is how collective bargaining works. As a safeguard, also, the Legislature has enacted section 60 to ensure that the bargaining agent fairly represents different employee groups.

19. The result of the majority decision is that the Faculty Association, and the faculty, will be deprived of the assistance and participation of the Osgoode Hall law faculty in their common affairs, including negotiations, while the law faculty will be divided from the rest of the campus and will be shorn of the strength that the support of a large bargaining unit would provide.

20. It must be borne in mind that the academic communities at universities in Ontario, including York, have for years been represented generally by faculty associations. These communities, represented by common faculty associations, have included faculty teaching

subjects leading to professional certification together with the general body of faculty members. Surely, it is not the purpose of certification to disrupt that fortunate circumstance, but to recognize it. Except in the case of professional engineers, the Labour Relations Act does not require such fragmentation. Furthermore, the Board's traditional policy is opposed to it. The result of the majority's decision is a sorry one for university faculties in Ontario generally.

21. In conclusion, I find scant evidence in the present case to support a separate unit for Osgoode faculty even if a separate application had been made for such a unit. I find nothing in the present case that would justify rejection of a comprehensive unit of York University faculty. To the contrary, I find the circumstances in this case to point overwhelmingly in the direction of a comprehensive unit of faculty at York University and I would so find.

0888-77-R 0962-77-R Re: Christian Labour Association of Canada, (Applicant), v. **Medi Park Lodges Inc.** carrying on business as: Crescent Park Lodge, (Respondent), v. Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C., (Intervener); AND Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C., (Applicant), v. **Crescent Park Lodge**, (Respondent), v. Christian Labour Association of Canada, (Intervener).

Certification – Practice – Procedure – Effect of consolidation of regular certification application with a prehearing vote application filed by a different union.

BEFORE: Rory F. Egan, Alternate Chairman and Board Members M. J. Fenwick and F. W. Murray.

APPEARANCES: Fred Heerema for the applicant/intervener, Christian Labour Association of Canada; L. Bertussi, R. Balcombe, M. Cox and B. Harrison for the respondent; J. Sack for the intervener/applicant, Service Employees Union, Local 204.

DECISION OF THE BOARD: October 19, 1977.

1. The Board directs that the above applications be and the same are hereby consolidated.

2. The name "Medi Park Lodges Inc." appearing in the style of cause of the application (File No. 0888-77-R) as the name of the respondent is amended to read: "Medi Park Lodges Inc. carrying on business as: Crescent Park Lodge".

3. The Board finds that the Christian Labour Association of Canada (hereinafter called 'CLAC') is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The Board further finds that the Service Employees Union, Local 204, Affiliated A.F. of L-C.I.O., C.L.C. (hereinafter called "Service Employees") is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

5. CLAC applied for certification on September 2, 1977. The Board fixed the terminal date as September 13, 1977. On the above terminal date, Service Employees filed an application under section 8 for a pre-hearing vote in the same bargaining unit as that initially sought by the applicant.

6. Pursuant to the provisions of section 92(3)(a), the Board has decided to treat the subsequent application as having been made on the date of the making of the original application.

7. At the hearing, CLAC requested a separate unit for the persons regularly employed for not more than 24 hours per week with certain exceptions as set out below.

8. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at its nursing home, Crescent Park Lodge, at Fort Erie, save and except Professional Medical Staff, Registered, Graduate and Undergraduate Nurses, Activity Director, Supervisors, persons above the rank of Supervisor, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit # 1).

9. Having regard to the agreement of the parties, the Board further finds that all persons regularly employed for not more than 24 hours per week and students employed during the school vacation period by the respondent at its nursing home, Crescent Park Lodge, at Fort Erie, save and except Professional Medical Staff, Registered, Graduate and Undergraduate Nurses, Activity Director, Supervisor, persons above the rank of Supervisor and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit # 2).

10. CLAC challenged the lists supplied by the respondent and contended that there should be added to the lists the names J. Beaudette, J. Conway, H. Hall and C. Vincent, all of whom the respondent says exercise management functions. The membership evidence is such that the omission from or addition to the lists of these names does not affect the percentage requirements of membership.

11. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit # 1, at the time the application was made, were members of CLAC on September 13, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent but not less than thirty-five per cent of the employees of the respondent in bargaining unit # 1, at the time that each application was made, were members of Service Employees at the time the latter made its application for a pre-hearing vote.

13. The Board is satisfied on the basis of all the evidence before it that less than thirty-five per cent of the employees of the respondent in bargaining unit #2, at the time that each application was made, were members of Service Employees at the time the latter made its application for a pre-hearing vote. The intervention of Service Employees, insofar as it has reference to bargaining unit #2, is accordingly dismissed.

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in bargaining unit #2, at the time the application was made, were members of CLAC on September 22, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will therefore issue to CLAC with respect to bargaining unit #2.

16. Insofar as bargaining unit #1 is concerned, the Board finds, upon an examination of the membership evidence filed, that a substantial number of persons on the lists have indicated a desire to be represented by both CLAC and Service Employees. With this in mind and having regard to the provisions of section 8 and section 7(2) of the Act, the Board directs that a representation vote be taken among the employees of the respondent in bargaining unit #1. All employees of the respondent in bargaining unit #1 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

17. Voters will be asked to indicate whether or not they wish to be represented by CLAC, Service Employees or no union at all in their employment relations with the respondent.

18. The four persons – Beaudette, Conway, Hall and Vincent – are to be permitted to vote if they so desire, but their ballots are to be segregated pending a decision by the Board as to their status.

19. The matter is referred to the Registrar.

0490-77-R The Retail Clerks International Association, (Applicant), v. Diamond "Z" Association, (Predecessor Trade Union), v. **Zehrs Markets Division Of Zehrmart Limited**, (Employer).

Successor Status – Whether purported merger complies with notice and other requirements of union constitution – Whether proper notice given to members.

BEFORE: Ian C. A. Springate Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: Clifford Evans and Alick Ryder for the applicant; Brian Nadalin and Brian Williamson for the predecessor trade union; J. P. Borden and V. Burnett for the employer.

DECISION OF THE BOARD: October 12, 1977.

1. The style of cause of this application is amended to add "Zehrs Markets Division of Zehrmart Limited" as the employer and to show the "Diamond "Z" Association" as the predecessor trade union rather than the respondent.

2. The applicant has applied to the Board pursuant to section 54 of The Labour Relations Act for a declaration that it has acquired the rights, privileges and duties of the predecessor trade union, the Diamond "Z" Association.

3. The parties were in agreement that the Diamond "Z" Association is the bargaining agent for employees of the employer in two separate bargaining units. One such bargaining unit is comprised of employees in certain of the employer's stores located in the City of Guelph. The other unit is comprised of employees working at the employer's produce and frozen food warehouse in the City of Kitchener.

4. Prior to June 12, 1977, the constitution of the Diamond "Z" Association contained no provisions relating to a possible merger, amalgamation or transfer of jurisdiction to another trade union. It did, however, provide that the constitution could be amended. At a meeting of some of the members of the Association held on June 12, 1977 a motion was passed to amend the constitution to provide for a possible merger, amalgamation or transfer of jurisdiction. Later at the same meeting a second motion was passed to in fact merge the Association with The Retail Clerks International Association. Both of these motions were carried by a vote of 79 to 3.

5. The meeting on June 12th was called by the President of the Diamond "Z" Association following the approval of the proposed amendment to the constitution by the Association's executive. At the hearing counsel for the employer suggested that the meeting may not have been properly called pursuant to the applicable provision in the Association's constitution in that it had not been called on the written request of 10 per cent of the Association's membership. The relevant provision in the constitution is to be found in the second paragraph of Article 4, and it states as follows:

"Special meetings of the Association may be called by the President at any time, and shall be called upon a written request signed by ten per cent (10%) of the membership within three days from such request."

6. We are satisfied that the requirements for the calling of a special meeting as provided for in the constitution were in fact met with respect to the meeting of June 12th. As we interpret the provision set out above, the President of the Association is required to call a special meeting if requested to do so by 10 per cent of the membership, but that apart from this mandatory requirement he also has the authority to call such a meeting on his own initiative "at any time".

7. Counsel for the employer raised certain concerns regarding the contents of the notice to members of the Diamond "Z" Association with respect to the meeting of June 12th. The wording of the notice is set out in full as follows:

DIAMOND "Z" ASSOCIATION
NOTICE OF MEETING TO ALL MEMBERS

There will be a special meeting of the DIAMOND "Z" ASSOCIATION

at *STEELWORKERS HALL ROOM 2 - GUELPH (Speedvale Ave. & Dawson Rd.)*

on *SUNDAY JUNE 12th - at 8:00 P.M. 1977*

The purpose of the meeting is to:

1. Amend the Constitution to add the following Article:

"This Association may be dissolved or it may merge or amalgamate with or transfer its jurisdiction to another trade union if the following conditions are satisfied:

- (a) the resolution to dissolve, merge, amalgamate or transfer the jurisdiction of the Association, as the cause may be, must be approved by a majority vote of the members attending a general or special meeting of the Association;
 - (b) members must be given notice of the meeting by posting the same on the bulletin board on all stores and warehouses, where the Association is the bargaining agent. The notice must advise the members that the meeting will vote on the question of a proposed dissolution, merger, amalgamation or transfer of jurisdiction, as the case may be;
 - (c) the terms upon which any dissolution, merger, amalgamation or transfer of jurisdiction is to take place shall be approved by a majority vote of the members voting at a meeting called for that purpose."
2. Vote on Dues Increase
 3. Vote on Contract Proposal
 4. To apply to merge the Association with the Retail Clerks International Association.
8. The concerns voiced by counsel for the employer relate to the fact that although the article purportedly added to the constitution on June 12th provided that the notice of a meeting to dissolve, merge, amalgamate or transfer jurisdiction "must advise the members that the meeting will vote on the question of a proposed dissolution, merger, amalgamation or transfer of jurisdiction, as the case may be", in fact the only specific reference in the notice regarding the proposed merger with the applicant stated simply that a purpose of the meeting was "to apply to merge the Association with the Retail Clerks International Association".
9. We would note that we see nothing inherently improper in having a union's constitution properly amended at a membership meeting to allow for a possible merger, am-

algamation or transfer of jurisdiction and for the union's membership at the same meeting to then vote in favour of such a merger, amalgamation or transfer of jurisdiction, (see, *Navco Food Services Limited* [1971] OLRB Rep. June 326 where such a procedure was followed). Nor do we see anything inherently wrong with having the members notified that both matters will be dealt with at the meeting by way of a single notice. However, this still leaves unanswered the question as to the adequacy of the wording of the notice with respect to the proposed merger having regard to the detailed requirements as set out in the newly amended constitution.

10. We are of the view that the provisions in a union constitution regarding the type of notice required to be given to members concerning a meeting where a proposed merger, amalgamation or transfer of jurisdiction is to be voted on cannot be treated lightly. On the other hand, however, we also are of the view that where in substance the notice requirements have been met and the members have in fact been provided with the information required by the constitution (or otherwise required by law), the Board should not be unduly concerned with the form which the notice might take.

11. In the instant case, although paragraph 4 on the notice does refer only to an application to merge with the applicant union, the preceding part of the notice stipulates that under the proposed amendment to the constitution any resolution to merge with another union must be approved by a majority vote of the members. Taking this latter point into consideration we are satisfied that when the notice is considered in its entirety the substance of the notice requirements as contained in the newly amended constitution were in fact met.

12. Counsel for the employer also made certain submissions with respect to the number of members of the Diamond "Z" Association who attended at the meeting on June 12th. It is undisputed that the great majority of the Association's members failed to attend the meeting. As counsel for the employer noted, it is possible that the relatively low turnout might have been due to many of the members not having received notice of the meeting. We will deal with that possibility later in this decision. We would note, however, that if reasonable attempts were made to ensure that the notice referred to above was brought to the attention of the membership at large, and that all of the relevant provisions of the constitution were adhered to, then it is our view that the mere fact that the majority of members chose not to attend the meeting would not be fatal to this application.

13. We recognize that at one time the Board refused to recognize any merger, amalgamation or transfer of jurisdiction unless it had been approved by a majority of employees in the affected bargaining unit. (See, for example, *The Hydro-Electric Commission of the City of Hamilton* 63 C.L.C. Para. 16,261). However, since the decision of the Ontario Court of Appeal in *Antgen v. Smith* (1969) 7 D.L.R. (3rd) 657, the Board has instead required only assurance that either the constitutional provisions of the predecessor trade union regarding a merger, amalgamation or transfer of jurisdiction have been followed (*Navco Food Services Limited* [1971] OLRB Rep. Feb. 80) or, if there are no such constitutional provisions, that there has been unanimous approval of the change by the union membership (*Redi Steel Products Ltd* [1970] OLRB Rep. Nov. 857).

14. Both Article 12 of the Diamond "Z" Association's constitution, which deals with amendments to the constitution, and the newly added constitutional provision respecting mergers, amalgamations or transfers of jurisdiction, require only that any relevant motions

be approved by a majority vote of the members attending at a membership meeting. Neither provides any minimum number of members who must be in attendance at such a meeting. The only reference in the constitution to a minimum attendance at meetings is to be found in article 8 which provides that 15 per cent of the members constitute a quorum at general meetings. Even if we were to assume that by implication such a quorum also applies to a special meeting such as that held on June 12th, we are satisfied that the requirement was met in this case. While no evidence was led as to the size of the actual membership of the Diamond "Z" Association, we were informed that the Association represented a total of some 325 employees of the employer. Even assuming that all of these employees were actually members of the Diamond "Z" Association, the 82 members who attended and voted at the June 12th meeting would have constituted significantly more than 15 per cent of the total membership.

15. Having regard to the above considerations we are satisfied, apart from the issue as to whether the membership at large had notice of the meeting of June 12th, 1977, that at that meeting the membership of the Diamond "Z" Association, in accordance with the constitution of the Association, both amended the constitution to provide for a possible merger, amalgamation or transfer of jurisdiction to another trade union and then proceeded to in fact approve of such a merger, amalgamation or transfer of jurisdiction to the applicant.

16. With respect to the issue of whether or not the notice of the meeting on June 12th was brought to the attention of the membership, the evidence led at the hearing established that the executive of the Diamond "Z" Association had formulated a plan to ensure that such in fact occurred. However, the evidence failed to establish that the plan had been fully implemented. Because of this there is insufficient evidence before the Board upon which it can conclude that the membership was adequately notified of the meeting. Quite apart from the requirement concerning the posting of notices contained in the amended constitution, it is now settled law that reasonable notice must be given to members of a union concerning any meeting called to decide upon a proposed merger, amalgamation or transfer of jurisdiction (See: *Faulds v. Hesford* (1957) 10 D.L.R. (2d) 292 (B.C. Sup Ct) and *Beef Terminal Limited* [1970] OLRB Rep. April 75.) This being the case, we are of the view that the Board is unable, at least at this time, to make the declaration requested of it in the application.

17. At the hearing counsel for the employer indicated that if the lack of evidence with respect to the notification of the members of the Diamond "Z" Association of the meeting on June 12th was the only matter preventing the Board from issuing the declaration requested by the applicant, the employer would not object to the convening of another hearing to allow the applicant to adduce further evidence in this regard. This being the case, we feel it would be appropriate to re-list this matter for hearing for the purpose of entertaining the evidence and the representations of the parties with respect to the notification of the members of the Diamond "Z" Association of the meeting of June 12th, 1977.

18. This matter is referred to the Registrar.

0838-77-R Walter Cvijic, (Applicant), v. Labourers' International Union of North America, Local 183, (Respondent), v. **York Condominium Corporation No. 77**, (Intervener).

Termination – Whether petition in support of application is voluntary – Discussion of proper procedure in termination applications.

BEFORE: P. Picher, Vice-Chairman, and Board Members M. J. Fenwick and R. W. Redford.

APPEARANCES: *Vladimir Walter Cvijic for the applicant; Brian Yandell and Tony Spada for the respondent; no one for the intervener.*

DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER M. J. FENWICK: October 25, 1977.

1. The applicant has applied under section 49 of *The Labour Relations Act* for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent.

2. In September, 1975, a collective agreement was reached between the union and employer with the assistance of a conciliation officer but was subsequently rejected by the employees in the unit. A second conciliation officer has now been appointed. By virtue of the provisions of section 15(4) of the Act, however, the second appointment does not present a bar to an application for a declaration under section 49.

3. Mr. Walter Cvijic testified on behalf of the petitioners. He stated that he first became aware of the return of the union on or about August 4, 1977 when Mr. Murphy, the manager of the respondent, explained that the union had re-appeared, told him that he had a right to organize a union or to discontinue it and asked if he would speak to the other employees to see what they wanted to do. Mr. Cvijic assured the Board that Mr. Murphy did not try to persuade him in either direction and left it to him to make the choice. According to Mr. Cvijic, each person he approached stated that he did not want the union.

4. On Friday, August 5th, Mr. Murphy went on holiday; on Monday, August 8th, Mr. Cvijic went to his office and asked Mrs. Porter, Mr. Murphy's secretary, what to do in view of the response of the employees. He testified that Mrs. Porter told him he would have to get up a petition and then designed and typed up a form for him to use. She also supplied and filled in Form 13, the actual application for the declaration, and showed him where to put his signature. Mr. Cvijic said he assumed that those in management knew about the existence of the petition because it was typed in Mr. Murphy's office. After Mr. Cvijic had obtained the signature of each of the employees, he put the petition and application form in an envelope and gave it to Mr. James Cousins, the President of the Board of Directors of the employer, to bring to the Board. He told Mr. Cousins what the envelope contained.

5. To give effect to a petition of this nature the Board must satisfy itself that it is a voluntary expression of desire. Because of the responsive nature of the employee/employer relationship, the Board is particularly sensitive to the participation of members of management in the origination and circulation of a petition. While managerial involvement may be

innocent and not designed to put pressure on the employees, the Board's concern emanates from the impact, intended or unintended, that such involvement may have on the free will of the employees.

6. In the circumstances outlined above, the Board is not persuaded that the petition is a voluntary expression of a desire to terminate the bargaining rights of the respondent union. In coming to this conclusion we take particular note of the existence of Mr. Murphy's request to Mr. Cvijic that he find out what the employees think (notwithstanding the fact that he explained that they had the right to exercise their choice freely), the fact that the manager's secretary, in the manager's office (albeit in his absence) supplied, drafted and typed all the required forms, and, finally, that it was the President of the Board of Directors who, after being informed of its contents, hand delivered the envelope to the Board.

7. Accordingly, the application is dismissed.

DECISION OF BOARD MEMBER R. W. REDFORD:

1. I dissent. On the basis of the evidence adduced before us I would have found that the stated opposition to the trade union represents the voluntary wishes of the employees. In my view the managerial contact with the petition was innocent and peripheral and not such as to taint its validity. In any event, the petition is merely a condition precedent to a representation vote and can have no other effect. In the circumstances I would have ordered a representation vote so that any doubt as to the employees' wishes could be resolved by a secret ballot vote.

2. The Labour Relations Act recognizes the right of dissatisfied employees to terminate the bargaining rights of their bargaining agent. So long as forty-five per cent of the employees in the bargaining unit voluntarily signify in writing that they no longer wish to be represented by the trade union, the employees are entitled to a secret ballot vote which will resolve the issue. Over the years the Board has developed a number of tests or indicia of voluntariness – none of which appear on the face of the statute or in the Board's rules of procedure. Persons appearing before the Board are entitled but not required to be represented by a lawyer. Unless employees are so represented, however, it is most unlikely that they will be aware of the rigid standards that the Board requires them to meet. This is ironic when one notes that the only effect of the petition is to entitle employees to a secret ballot vote.

3. For the purpose of clarity it may be useful if I set out exactly what the Board's "tests" are since as I have already noted it is difficult to deduce them except from a reading of a number of the Board's own decisions. These "tests" and procedures are as follows:

- a) The termination application may only be made during the "open period" of the collective agreement: which generally is during the last two months of the agreement (see section 49).
- b) The employees must file their application with the Board on form 12 and with form 12 they should attach a petition indicating that more than forty-five per cent of the employees in the bargaining unit no longer wish to be represented by the trade union. The heading of the petition must be clear, and present on the petition

when each employee signs. It must plainly say "We, the under-signed employees of XY Company, no longer wish to be represented by AB Union" or words to this effect.

- c) The person circulating the petition cannot discuss it with the employer;
- d) The person circulating the petition should not obtain signatures within sight of a member of management;
- e) Every signature on the petition must be witnessed and such witness must testify before the Board on matters relating to the preparation of the petition, the obtaining of the signatures and the circulation of the document in question;
- f) The petition must not leave the person's hand who circulates it – if it does, then the person it is given to must appear before the Board to give evidence;
- g) The person circulating the petition must not get time off from work in order to mail the petition by regular mail. (It must be noted that special delivery mail, even if mailed by the terminal date, will be rejected by the Board if not received by the Board by the terminal date. A person filing documents with or sending communications to the Board should do so by registered mail.)
- h) The person circulating the petition must not arrange for time off with pay to attend the Board hearing;
- i) Should the person circulating the petition have any member of management sign it for whatever reason (even if the member of management believes he or she is in the bargaining unit) then all signatures secured subsequent to that of the member of management are disregarded by the Board, and the petition may be rejected altogether;
- j) The person circulating the petition is subjected to rigorous cross-examination by the Board on questions pertaining to the origination, preparation and circulation of the petition.

4. In my view, it is incumbent upon the Board to be at least as concerned about the interests of individuals appearing before it as it is for the interests of employers and trade unions – particularly where, as here, the employees merely wish the Board to conduct a secret vote. While it is clear that a failure to comply with any of these requirements will not necessarily invalidate a petition (see *Standard Brands* Board File No. 0419-77-R), nevertheless, I am concerned that a rigid application of pre-determined "tests" may well prevent the exercise of rights which section 49 of the Act recognizes and guarantees. It should be noted that in the case before us the union has been dormant since 1975 and there are only three employees in the unit. In the circumstances I would have allowed them the opportunity to express their views in a secret vote.

0005-77-R Labourers' International Union of North America, Local 183, (Applicant), v. **York Condominium Corporation** Number 46 and/or Medhurst Hogg and Associates Limited, (Respondent).

Certification – Related Employer – Whether respondents are joint employers – Whether respondents related – Criteria for identifying employer

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: S.B.D. Wahl, B. Yandell, T. Spada and M. McPhedran appearing for the applicant; R. N. Gilmore, David Medhurst and R. D. Hogg appearing for Medhurst Hogg and Associates Limited; W. S. Gardner, Muntaz Ally and Nashir Mawjee appearing for York Condominium Corporation Number 46.

DECISION OF THE BOARD: October 18, 1977.

1. In this application for certification the applicant filed six certificates of membership. The certificates are signed by the members and indicate that monthly dues of \$5.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificates are checked and certified correct by an officer of the applicant. The applicant also filed a duly completed Form 8, Declaration Concerning Membership Documents.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

3. The applicant is seeking certification with respect to certain employees. It is the applicant's position that the respondents are either co-employers or joint employers. The applicant relied on section 1(4) of The Labour Relations Act. The Board heard evidence and argument with respect to whether York Condominium Corporation Number 46, ("York") and/or Medhurst Hogg and Associates Limited ("Medhurst") were the employer or employers of the persons who are affected by this application at the material times. The Board also heard evidence and argument with respect to the application, if any, of section 1(4) of The Labour Relations Act.

4. On the first day of the hearing, the applicant and York entered into the following agreement:

STATEMENT OF AGREED FACTS AS BETWEEN YORK CONDOMINIUM CORPORATION # 46 AND LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183

(1) All employees of the respondent engaged in cleaning and maintenance of the buildings located at 50 Lotherton Pathway, 100 Lotherton Pathway, 200 Lotherton Pathway, 101 Lotherton Pathway, and 940 Caledonia Road, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff.

(2) The members of the bargaining unit described above are eight in number and comprise the following individuals: Ralph Welsh, Joseph Lall, Stanford Levy, Neil Hanrahan, Dale Leitch, Paul Satinder Kahlon, J. Flora, Oscar Flores.

(3) The above-mentioned individuals were prior to April 1, 1977, members of a bargaining unit represented by the applicant, and subject to a collective agreement between the applicant and Property Management Services organization, of which Greenwin Property Management is a member. The certificate certifying the applicant to represent the members of the above mentioned bargaining unit in their labour relations with Greenwin Property Management was issued May 19, 1976. The certificate has not been cancelled or revoked. The collective agreement between the applicant and Greenwin Property Management (through Greenwin's membership in the above-named organization) is still in effect.

(4) All of the above-named individuals received on April 1, 1977, letters signed by M. Ally, President of the Board of Directors of York Condominium Corporation #46, indicating that their employment at the premises indicated in the above-mentioned description of the bargaining unit would end effective April 30, 1977. The letters were on paper that bore the letterhead of York Condominium Corporation #46.

May 2, 1977.

“W.E. Gardner”

ON BEHALF OF YORK CONDOMINIUM #46

“S. Wahl”

ON BEHALF OF THE APPLICANT

5. The application for certification was filed on April 1, 1977. The terminal date for this application was originally fixed as April 13, 1977. However, the terminal date for this application was subsequently extended to April 21, 1977. Up to about April 1, 1977, the cleaning and maintenance at York was performed by Greenwin Property Management Ltd. (“Greenwin”). On May 19, 1976, the Board issued a certificate to the applicant with respect to a bargaining unit of “all employees of Greenwin engaged in cleaning and maintenance at Caledonia Village (YCC 46), Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff”. Subsequently, the persons who are affected by this application were covered by a collective agreement which was binding on the applicant on Greenwin.

6. Unhappy differences arose between York and Greenwin over the cleaning and maintenance at Caledonia Village. This led to the termination of the management contract between York and Greenwin. On April 1, 1977, Greenwin advised the applicant that it was no longer the managing agents for York and also informed the applicant that any matters relating to on-site staff should be discussed with Medhurst. Greenwin completely withdrew its presence from Caledonia Village on April 1, 1977.

7. April 1, 1977, was a particularly eventful day for the employees at Caledonia Village. York's board of directors informed the employees that there was going to be a meeting at 2:00 p.m. All of the employees attended this meeting together with David Medhurst, the president of Medhurst, and Mr. Ally, the president of York. At this meeting the employees were told by Mr. Ally that Greenwin was no longer the manager, that they were being dismissed and that Medhurst would be the new manager at York. Mr. David Medhurst was introduced as the president of Medhurst. Mr. Ally told the employees that Mr. Medhurst was going to bring in his own people and that some of the employees might be rehired.

8. A further meeting was held at approximately 7:15 p.m. on April 1, 1977. The employees were again in attendance together with Mr. Ally and another director of York. At this meeting all of the employees except Mr. Ralph Welsh were handed letters which were dated April 1, 1977. These letters stated:

Please be advised that your position with York Condominium Corporation No. 46 has been terminated effective April 30, 1977. We are giving you four weeks notice so that you may utilize the time to find other employment.

We have engaged a new management company and they will be providing new staff in accordance with their contract.

York Condominium Corporation No. 46 will no longer be employing any on-site maintenance personnel.

We wish to thank you for past services.

Yours truly,

(Sgd.) M. Ally
M. Ally
President
Board of Directors

Mr. Welsh did not receive such a letter because Mr. Ally took the position that he had quit his employment. For the purposes of this application, however, it is not necessary for the Board to decide whether Mr. Welsh quit his employment at Caledonia Village.

9. The Board heard a great deal of evidence from various witnesses concerning the relationship between the employees at Caledonia Village on the one hand and Greenwin, Medhurst and York on the other. The Board also heard evidence on the nature of the relationship between Medhurst and York. It was agreed by the parties that the persons who are affected by this application are employees. The parties differed on the identity of the employer or employers of these persons and in this regard there was a divergence of views on whether a relationship of co-employers or joint employers existed with respect to the two respondents. The applicant relied on the provisions of section 1(4) of The Labour Relations Act.

10. In determining which of two or more parties is or are the employer(s) of certain employees, the Board has applied a series of criteria which are listed below:

- (1) The party exercising direction and control over the employees performing the work. – See the *Municipality of Metropolitan Toronto* case, 61 CLLC ¶ 16,214; the *Sentry Department Stores Limited* case, [1968] OLRB Rep. 540, 546; the *Beer Precast Concrete Limited* case, [1970] OLRB Rep. 224, 227-8; the *Belcourt Construction (Ottawa) Limited* case, [1971] OLRB Rep. 321, 324; and the *Reid's Holdings (Belleville) Limited* case, [1972] OLRB Rep. 753, 761.
- (2) The party bearing the burden of remuneration. – See the *Municipality of Metropolitan Toronto* case, *supra*; the *Goldlist Construction Limited* case, [1966] OLRB Rep. 487, 488; the *Beer Precast Concrete Limited* case, *supra*; the *Kel Truck Services Ltd.* case, 1972 CLLC ¶ 16,068; and the *Templet Services* case, [1974] OLRB Rep. 606, 608.
- (3) The party imposing the discipline. – See the *Reid's Holdings (Belleville) Limited* case, *supra*; and the *Templet Services* case, *supra*.
- (4) The party hiring the employees. – See the *Municipality of Metropolitan Toronto* case, *supra*; the *Sentry Department Stores Limited* case, *supra*; and the *Reid's Holdings (Belleville) Limited* case, *supra*.
- (5) The party with the authority to dismiss the employees. – See the *Municipality of Metropolitan Toronto* case, *supra*; and the *Templet Services* case, *supra*.
- (6) The party who is perceived to be the employer by the employees. – See the *Sentry Department Stores Limited* case, *supra*.
- (7) The existence of an intention to create the relationship of employer and employees. – See the *Belcourt Construction (Ottawa) Limited* case, *supra*.

11. The Board has reviewed the evidence before it in the light of the criteria which had been set forth in paragraph 10. With reference to the exercise of direction and control over the employees, the Board finds that the employees were given the month of April to find new employment. Some directions were given by Mr. Ally, the President of the Board of Directors of York. While it appears that Mr. Medhurst gave some directions to the employees at the site, the Board is of the opinion that he did this in response to questions by the employees. In our view, the employees at the site were trying to impress Mr. Medhurst with their abilities and qualities as potential employees of Medhurst. For the most part, the employees carried on the duties which they had performed when they were employed by Greenwin. With respect to the criterion of the party bearing the burden of remuneration, the Board finds that the employees were paid through a trust account by Greenwin with co-signing of the cheques by Directors of York. Greenwin's management contract with York had been terminated on April 1, 1977, so that while Greenwin and York were jointly the pay masters there is no doubt that during the month commencing on April 1, 1977, York was bearing the burden of remuneration. The Board finds that neither York nor Medhurst

exercised any discipline on the employees during the month of April 1977. With respect to the hiring of the employees, the Board finds that Mr. Ally, by his letter to the employees dated April 1, 1977, and his subsequent conduct on behalf of York on April 1, 1977, hired the employees at the site on that date for a period of one month. While York was not obligated to offer employment to Greenwin's former employees, it nevertheless, through its conduct, hired the eight employees who are affected by this application on April 1, 1977. Equally there can be no doubt that Mr. Ally, on behalf of York dismissed the employees effective April 30, 1977. The employees found it extremely difficult to perceive who was their employer during April of 1977. There was a state of turmoil and uncertainty. Dale Leitch asked Mr. Medhurst what were his chances of being re-hired. Mr. Welsh was surprised that York was dismissing him and when Mr. Lall left the site during mid-April, he had to re-apply to Greenwin for a new position. During the month of April, the Board finds that Medhurst had no intention to create the relationship of employer and employees at Caledonia Village. On the other hand, York authorized the payment of salaries through the trust account which was then being handled by Greenwin. In addition, York created and terminated the employment relationship with respect to the eight employees who are affected by this application.

12. On April 1, 1977 in particular and throughout that month, there was turmoil and generally unsettled conditions at Caledonia Village. There was no real presence on the site by Medhurst during that month. Under the authority contained in the Declaration made pursuant to the Condominium Act, R.S.O. 1970, Chapter 77 and By-Law #1, York entered into management agreements. The prior management agreement was with Greenwin and subsequently a management contract was entered into with Medhurst. The latter contract commenced on April 1, 1977. Apparently, tighter control over the finances of York and over the hiring and dismissal of employees were contained in the management contract with Medhurst. However, while the management contract with Medhurst commenced on April 1, 1977, the Board finds that in so far as the hiring of employees was concerned, the contract referred prospectively to new employees. Medhurst was not the employer of any of the persons affected by this application during the month of April 1977. It was argued before the Board that York and Medhurst were co-employers. The Board is unable to agree with this argument. There is no evidence which would establish any co-employment relationship with respect to York and Medhurst. In our opinion, subsequent to the month of April 1977, Medhurst was empowered under the management contract with York to hire and dismiss employees. York and Medhurst under the terms of the contract deal with each other arms-length and there is not doubt that future employees of Medhurst are not subject to any direct control by York.

13. The Board now turns to the question of the application, if any, of section 1(4) of The Labour Relations Act. In the *Walter Lithographic Company Limited* case, [1971] OLRB Rep. July 406, p. 412, the Board set forth certain indicia or criteria which it considers relevant in making a determination as to whether the activities or business of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer. These criteria are: (1) common ownership or financial control; (2) common management; (3) interrelationship of operations; (4) representation to the public as a single integrated enterprise; and (5) centralized control of labour relations. The Board added in that case that no single criterion is likely to decide the issue but rather the determination would be based upon an appraisal of all these criteria in the light of the particular facts. The Board also

added that in applying these criteria, the greater degree of functional coherence and interdependence among the associated or related activities and businesses, the more probable it would be that the Board would find that the entities carrying on these activities would be treated as one employer.

14. With respect to York and Medhurst, there was no common ownership or financial control and there was no common management. York and Medhurst do not have an interrelationship of their operations because they deal with each other at arms-length. York is merely one of Medhurst's clients. The fact that Medhurst performs some of its services at Caledonia Village does not in itself constitute an interrelationship of operations. With respect to the representation to the public as a single integrated enterprise, it was argued that since Medhurst had the physical control of and answered a telephone which is listed in the name of York this constitutes a representation to the public. The Board does not agree with this reasoning. The Board is satisfied that the reason for this arrangement is to enable third parties (principally governments) to contact York with respect to problems and practices which may arise in the operation of a condominium. With respect to the fifth criterion, during the month of April there was no centralized control of labour relations and while the management contract does refer to remuneration for any services rendered by Medhurst in negotiating with trade unions on behalf of or in concert with York, we are of the opinion that this clause, standing alone, would not constitute a centralized control of labour relations. Having regard to the foregoing, the Board is not prepared to find that Medhurst and York carry on associated or related businesses, under common control or direction within the meaning of section 1(4) of The Labour Relations Act.

15. The Board finds that on April 1, 1977 and throughout that month, York was the only employer of the employees who are affected by this application. Having regard to the agreement between York and the applicant, the Board further finds that all employees of York Condominium Corporation Number 46, engaged in cleaning and maintenance of buildings located at 50 Lotherton Pathway, 100 Lotherton Pathway, 200 Lotherton Pathway, 101 Lotherton Pathway and 940 Caledonia Road, including residential superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The applicant filed evidence of membership of the type referred to in paragraph 1 on behalf of six of the eight persons whose names appear on Schedule "A" which was filed by York. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 21, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

0873-77-R Robert Spearman, (Applicant) v. United Electrical Radio & Machine Workers of America (UE), (Respondent), v. Westinghouse Canada Limited, (Intervener).

Termination – Whether petition in support of application a voluntary expression of employee wishes.

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and D.B. Archer.

APPEARANCES: A.R. Spearman for the applicant; V. Bjarnason and John Lepitre for the respondent; John C. Murray and D.S. McCreesh for the intervener.

DECISION OF IAN C.A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER H.J.F. ADE: October 25, 1977.

1. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents the employees in a bargaining unit for which it is the bargaining agent.

2. The respondent and the intervener are parties to a collective agreement which expired on October 23, 1977. The collective agreement covered a bargaining unit comprised of the following employees:

“all office and clerical employees of (Westinghouse Canada Limited’s) plant located at Huron Street and Clarke Side Road, in the City of London, save and except foremen and supervisors, those above the rank of foreman and supervisor, professional engineers, nurse, secretaries to each of the Plant Manager, the Personnel Manager, the Manager of Station Products, the Manager of Protective Products, and the Manager of Manufacturing, Personnel Department, buyers, marketing negotiators, manufacturing engineers, industrial engineers, analysts, assistant engineering mechanical, assistant engineering electrical, section head cost accounting, co-ordinators, clerks-engineering, programmers, key-punch operators, security guards, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students employed on a co-operative training programme and those covered by the Collective Agreement between Westinghouse Canada Limited and the United Electrical, Radio and Machine Workers of America (U.E.) Local 546.”

3. The parties are in agreement that this application is timely and also that the applicant is an employee in the bargaining unit set out above.

4. The documentary evidence filed in support of the application consists of a one-page statement of desire headed up “We, the undersigned, wish to withdraw our membership from Local 564 (salaried) of the U.E.W.” At the hearing the representative of the respondent contended that since the heading on the statement of desire referred only to a withdrawal of membership from the respondent, the statement should not be accepted in support of an application to terminate the respondent’s bargaining rights.

5. Section 49(3) of the Act requires that with respect to applications such as this the Board determine whether not less than 45 per cent of the employees in a bargaining unit have voluntarily signified in writing that they no longer wish to be represented by a trade union. It is our view that in making such a determination the Board should not be unduly technical with respect to the wording used on a statement of desire filed in support of the application. In this regard we would adopt the reasoning of the Board in the *Genwood Industries Ltd.* case, [1976] OLRB Rep. Aug. 417, where, when faced with a statement of desire worded not unlike the one now before us, the Board stated (at page 419):

"It is the intention of section 49 that it shall be the primary concern of the Board to ascertain the wishes of the employees voluntarily expressed in writing. The right of employees to come before us would be seriously abridged, and the ability of the Board to ascertain their wishes would be unnecessarily fettered, if we were to adopt the "forms of action" approach suggested by Mr. Sack. The right of a group of employees to bring their written wishes before the Labour Relations Board cannot be made to depend strictly upon the choice of words made by persons who may be uninitiated in the niceties of pleading. Frequently, as here, petitions of this kind are drafted by rank and file workmen of limited writing ability and without the assistance of legal counsel. To adopt the legalistic approach suggested would be unrealistic and would frustrate the intention of the Act."

6. There is, unfortunately, a paucity of evidence before the Board concerning what was said to employees as they were approached to sign the statement of desire as well as to how the statement was viewed by the employees. However, we do have the testimony of Miss R. Patton, who was called to testify by the respondent trade union, that when she was approached by Mrs. L. Lane concerning the statement of desire she asked Mrs. Lane if its purpose was the decertification of the union, and that Mrs. Lane responded that yes, it was. We also have the testimony of Mrs. Lane and Mrs. J. Vickerage concerning discussions among a number of employees relating to a desire to no longer be represented by the respondent. In these circumstances, we are of the view that it would be quite artificial to regard the statement of desire as reflecting merely a wish to withdraw from membership in the respondent. In these circumstances, then, we are prepared to accept the statement of desire as representing a signification by employees that they no longer desire to be represented by the respondent.

7. Although we accept the statement of desire as a signification by employees that they no longer desire to be represented by the respondent, we recognize that the employees were not told that it would be used to actually support an application to terminate the respondent's bargaining rights. Indeed both Mr. Spearman, the applicant, and Mrs. Vickerage, an employee who played a key role in the circulation of the statement of desire, indicated that the original purpose for circulating the statement had been to merely ascertain the number of employees who no longer desired to be represented by the respondent, and that it was only later when they inquired into the termination process did those active in their opposition to the respondent conclude that the statement was, in the words of Mr. Spearman, "exactly what we needed." It is our opinion that the fact that the applicant and those who were associated with him in this regard came to realize that the statement of desire could be used to support an application such as this subsequent, rather than prior, to its

circulation does not make it any less a signification by employees that they no longer desire to be represented by the respondent. This being the case we are unwilling to set aside the statement of desire on this basis.

8. On the date of the making of the application there were 41 employees in the bargaining unit. The statement of desire filed in support of the application was signed by 31 persons, 30 of whom were employees in the bargaining unit. There was also filed with the Board a statement in support of continued representation by the respondent which was signed by 18 employees in the bargaining unit. Of these 18 employees, 10 had also signed the statement of desire in support of the application. It is clear that in these circumstances even if we were to disregard the signatures of the 10 employees on the statement of desire who signed both documents, there would still remain a net total of 20 out of 41 employees in the bargaining unit who by the terminal date had indicated they no longer wished to remain represented by the respondent. This figure represents more than the 45 per cent required by section 49(3).

9. There still remains, however, the question as to whether the statement of desire represents a voluntary signification of employees. It is perhaps worth noting at the outset in this regard that there is nothing in the evidence which would indicate management involvement in, or support of, the statement of desire. Indeed, the evidence establishes that prior to the origination of the statement of desire when one of the employees, Mrs. J. Vickerage, went to see the intervener's plant superintendent to explain to him that in her opinion most of the employees no longer wished to be represented by the respondent, she was informed that management could neither assist her in this regard nor for that matter even offer her any advice.

10. The Board heard first hand evidence relating to the organization and circulation of the statement of desire. There is nothing in this evidence which even suggests that employees might have signed the statement of desire for reasons other than to voluntarily express their personal views.

11. During the course of the hearing one of the witnesses, Mrs. Lane, testified that she had personally witnessed a number of employees sign the statement of desire. However, two of these employees, Miss Patton and Miss D. Lasenby, testified that although Mrs. Lane had handed the statement of desire to Miss Patton after discussing it with her, both of them had in fact signed the statement of desire after Mrs. Lane had left their presence and prior to her returning a short time later when she was handed it back. Miss Patton's testimony indicated that during Mrs. Lane's absence only herself and Miss Lasenby had had an opportunity to see the statement of desire. On the basis of the conflict between the testimony of Mrs. Lane on the one hand and Miss Patton and Miss Lasenby on the other, the representative of the respondent submitted that the Board should disregard all of the signatures on the statement of desire which Mrs. Lane claimed to have witnessed. Presumably this was based on the assumption that no weight can be given to any of Mrs. Lane's testimony.

12. It is our view that Miss Patton and Miss Lasenby are more likely to accurately remember the circumstances under which they came to sign the statement of desire than is Mrs. Lane, who was responsible for obtaining a number of signatures. Because of this we are prepared to accept the testimony of Miss Patton and Miss Lasenby on this point over

that of Mrs. Lane. Having reached this conclusion we turn to the proposition that all of Mrs. Lane's testimony should be rejected. We observed Mrs. Lane's demeanour on the witness stand. We have now carefully reviewed all of her evidence and assessed it both against the evidence of the other witnesses and also against the background situation present here. Having done so, we find no additional matters which might cause us to doubt Mrs. Lane's testimony. Further, on the one point where we have concluded Mrs. Lane's testimony to be incorrect, there was nothing in the alternative explanation put forward by Miss Patton and Miss Lasenby which would cast any doubt on the voluntariness of their signatures. In other words, there was no compelling reason as to why Mrs. Lane should have been trying to deliberately mislead the Board. In these circumstances we are of the view that while Mrs. Lane's recollection as to whether she was actually present when the two signatures were placed upon the statement of desire was inaccurate, we nevertheless accept the remainder of her testimony all of which went completely unchallenged and uncontradicted.

13. Having regard to our conclusions above, we are satisfied that the statement of desire reflects the voluntary wishes of those who signed it.

14. Following from all of the above, we find that not less than 45 per cent of the employees of Westinghouse Canada Limited in the bargaining unit at the time the application was made, had voluntarily signified in writing that they no longer wish to be represented by the respondent trade union on September 14, 1977, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 49(3) of the Act.

15. Accordingly we direct that a representation vote be taken of the employees of Westinghouse Canada Limited. Those eligible to vote are all employees coming within the bargaining unit set out in paragraph 2 above on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

16. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Westinghouse Canada Limited.

17. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER D.B. ARCHER

I disagree with my colleagues.

Loretta Lane, a foreman's clerk, testified that she received the petition from the front office switchboard. The front office switchboard operator, Jackie Vickerage, testified that Spearman told her "we should get a consensus" and the petition was then circulated. She had no knowledge that it would result in these proceedings. The purpose of the petition becomes important when we come to who witnessed the signatures and what was said or understood at the time of signing. She also admitted she went to Mr. Vauxhall, Plant Superintendent, to discuss "representation" of the union. Mr. Vauxhall refused to discuss the union with her.

The petition was to find out if the employees wanted a union, not to apply for decertification. It is impossible for Mrs. Lane to testify as to what was said because, according to Miss Patton's testimony, Mrs. Lane did not witness the signatures she said she did and, therefore, could have no knowledge of what was said at the time of signing.

The petition, according to Mr. Spearman, was to find out the wishes of the employees; it is interesting to speculate on the worth of a petition signed for one purpose and used for another.

For all these reasons I would have dismissed the application.

0811-77-U International Brotherhood of Electrical Workers, Local Union 105, (Applicant), v. Rondar Services Limited and Darvin H. Puhl, (Respondent).

Lockout – S. 123 – Whether a number of irrevocable terminations constitute a lockout – Terminations not intended to modify behavior of employees or induce them to agree to terms of employment – Whether employer conduct is a lockout.

BEFORE: Kevin M. Burkett, Vice-Chairman.

APPEARANCES: *S.B.D. Wahl, Royce Arnold, Joseph Jocilffe and L. Richmond for the applicant; C.E. Humphrey and Darvin Puhl for the respondents.*

DECISION OF THE BOARD: October 5, 1977.

1. This is an application filed under Section 123 of the Act alleging that the respondent engaged in an unlawful lock-out when on or about August 17, 1977 Darvin H. Puhl, on behalf of himself and Rondar, advised Robert Kurtz, Robert Brown, Robert Stewart, Andreas Vencel, Guelph Husk and Brian Millie, employees of Rondar and members of Local 105 of the International Brotherhood of Electrical Workers, the applicant, that their employment with Rondar would be terminated as of August 31, 1977.

2. The union called a number of the bargaining unit employees to give evidence. The company chose not to call evidence.

3. The evidence establishes that the above named employees of Rondar performed the majority of their work (in excess of 70%) at the Canada Centre for Inland Waterways, Burlington, although from time to time they worked elsewhere for Rondar. The company is under contract to the Canada Centre for Inland Waterways to perform electrical construction work. The company's contract with Canada Centre for Inland Waterways expires August 31, 1977 and the company's continued association with the Canada Centre for Inland Waterways is dependent on its tendering the low bid for the electrical work covering the 3 year period commencing September 1, 1977. The above named employees of Rondar all received termination notices dated August 17, 1977 to be effective August 31, 1977.

4. The applicant union applied to be certified on July 8, 1977 for a bargaining unit of employees at Rondar Services Limited described as follows:

"All electricians, electricians' apprentices and helpers in the employ of the Respondent save and except for non-working foremen and persons above the rank of non-working foreman."

The notice of the application was received by the company and posted by it on July 13, 1977.

5. Evidence was adduced of a meeting called by Mr. Darvin Puhl, an official of Rondar, in late May, 1978. The evidence establishes that there was dissension among the employees of Rondar working at the Canada Centre for Inland Waterways with respect to the wage rates they were being paid. Mr. Puhl told the employees that he was "sick and tired" of the dissension and that he did not want any further unrest. He told the employees that he would accept the resignations of those who felt they could earn more elsewhere. The Board is satisfied that the question of union representation was not discussed at this meeting.

6. Evidence was also adduced of a meeting which was called by the company on Monday July 11 which took place at 4:00 p.m. on Wednesday, July 13; the same day as the notice of the union's application for certification was posted by the company. The evidence established that Mr. Puhl read the notice. The union witnesses when asked in direct examination if Mr. Puhl stressed those sections of the notice dealing with opposition to the union stated that he did not. Mr. Puhl told the employees that they should make up their minds so as the company would know whether to tender for the Canada Centre for Inland Waterways contract on the basis of union or non-union rates. He also commented in the course of the discussion which followed his reading of the notice, that if the company bid on the basis of union rates its chances of getting the contract were "minimal." Mr. Puhl also indicated that he was interested in finding out who were the employees in the bargaining unit. The Board considers this to be evidence of a desire on his part to determine the composition of the bargaining unit and not the names of individuals who signed union cards. Mr. Puhl then left the meeting and the evidence does not disclose that he discussed the question of union representation with any of the bargaining unit employees from that day to the date the employees received their notices of termination. The evidence does establish that on August 18, Ron Pertras, an official of the respondent, told Robert Brown, a bargaining unit employee, that although the company had plans to send "the guys" elsewhere the company would have to contract out to non-union contractors.

7. The evidence does not establish that any of the bargaining unit employees were told by officials of the company or otherwise informed that their termination could be averted by any action on their part.

8. The union adduced evidence of a Christmas bonus which was paid by the company and which was based on 25c. for each hour worked in 1975 but was altered to reflect individual merit in 1976. The evidence establishes that Darvin Puhl told Robert Stewart, a bargaining unit employee, that the question of whether the employees who were to be terminated would receive a Christmas bonus was "in the hands of Rondar's lawyer." There was no evidence adduced going to whether the Christmas bonus had ever been paid to employ-

ees who worked part of the year but who were no longer employed as of December 25. The Board also heard evidence of the company's practice of paying a \$6 meal allowance to anyone required to work beyond 6:00 p.m. and of the company's failure to follow its practice on two occasions in August, 1977.

9. The union based its representation upon a statement found in re *Ralph Milrod Metal Products Limited* case, Board File No. 1274-76-U and 1276-76-U dated February 28, 1977. The Board stated at para. 39 therein:

"The definition of 'lock-out' as it is presently worded would appear to include any situation in which an employer's refusal to employ employees is grounded in an unfair labour practice (although of course the burden of proof in a lock-out application is not reversed as it is in the case of a single unfair labour practice complaint)."

It is the contention of the union in this matter that the termination of all the bargaining unit employees regularly assigned to Canada Inland Water Commission by the company was rooted in a desire by the company to defeat their rights under the Act to join a trade union of their choice. Counsel for the union referred the Board to the *National Automatic Vending* decision (1963) C.L.L.C. 16,276 and asked the Board to consider the contemporaneous union activity, the timing of the termination, and the respondent's failure to call evidence when the real reason for the terminations lies within its knowledge and to draw the inference of an anti union animus. He asked the Board to also consider the comments of Mr. Puhl with respect to the effect of unionization upon the company's bid for the work at the Canada Inland Waterways Commission, the company's deviation from its meal allowance practice and its decision to put the question of the Christmas bonus "in the hands" of its lawyer and determine that the terminations were grounded in an unfair labour practice and hence constituted a lock-out. Counsel for the union concluded his remarks by stating that even an irrevocable decision to terminate which is motivated by a desire to impair rights under the Act is a lock-out.

10. The company argued that a lock-out within the meaning of the act is comprised of two elements, the closing of the business or refusal to continue to employ etc. (i.e. the objective element) and the compelling or inducing of employees to refrain from exercising rights under the Act etc. (i.e. the subjective element). Counsel argued that the only issue before the Board is whether the refusal to continue to employ was done for the reason set out in the statutory definition. The company relied upon the *Livingston Transportation Limited* decision, [1976] OLRB Rep. July 346, wherein the Board stated at para. 12:

"In this regard even though the respondent has transferred part of its London business to other terminals, the fact remains that the London closing was not accompanied by any intimation, either direct or inferential, of a possibility of continuing the operation conditional upon the agreement of the employees to cease exercising certain of their rights or privileges under the Act or to their agreeing to any changes in provisions respecting their conditions of employment. This being the case it cannot be said that the closure of the terminal came within the definition of 'lock-out' in Section 1(1)(i). (In this regard see *Amalgamated Electric Corporation Limited*, [1963] OLRB Rep. Oct. 403 and *Fleetwood Corporations*, [1974] OLRB Rep. June 385.)

Counsel for the company argued that because there were no threats or intimidation accompanying the termination of the bargaining unit employees the Board could not find that the company's decision was designed to compel or induce its employees to refrain from exercising rights under the Act and could not find, therefore, a lock-out within the meaning of the Act. He argued further that the Board must distinguish between a Section 79 complaint and a Section 123 application and disputed the contention of the union that the considerations outlined in the *National Automotive Vending* decision (supra) are relevant in determining if the terms of the statutory definition of "lock-out" have been met. Alternatively, he argued that in any event the union's position must fail because the Board cannot find an anti union animus on the evidence before it.

11. The union has relied upon the statement recited from *Ralph Milrod Metal Products Limited* (supra) and has attempted to establish an anti union motive for the terminations and hence a lock-out. The company, on the other hand, relied upon the test applied in *Livingston Transportation* (supra) and chose not to call any evidence in the face of the union's failure to establish that the employees who received notice of termination had been compelled or induced to refrain from anything. The parties approached the issue from two different points of view, both of which have found expression in Board decisions. It falls to the Board in these circumstances to analyze the jurisprudence of the Board vis-a-vis the statutory definition of lock-out and decide if the conduct of the employer in the instant case is caught by the definition.

12. A public policy enunciated by the legislature in the Labour Relations Act is to maintain industrial and economic peace during the term of a collective agreement and pending utilization of the conciliation process. This policy is effected through the prohibition set out in section 63 of the Act and by the mechanism of compulsory grievance arbitration which is the statutory *quid pro quo* for the restriction placed upon the use of economic sanctions during the proscribed periods. The importance of this public policy is underscored by the fact that the legislature has provided a separate remedial avenue to deal with alleged unlawful strikes and lock-outs which is distinct and separate from the remedial avenue provided for all other alleged violations of the Act.

13. A reading of the statutory definition in light of the public policy referred to above establishes that the definition is designed to cover employer sanctions motivated by a desire to compel or induce an alteration or modification of behaviour, i.e. an agreement respecting terms and conditions of employment or a refraining from the exercise of rights under the Act. An employer is not prohibited from laying-off, contracting-out or going out of business during the periods when it is unlawful to lock-out. Rather, the definition has been formulated to catch economic sanctions which are designed to influence employee behaviour. The use of the verb "refrain" which means to "hold oneself back" or "to keep oneself from doing", and the reference to an agreement respecting terms and conditions of employment bespeak a continuing but altered employment relationship. The motive which brings a refusal to continue to employ within the definition, therefore, is one directed at altering or modifying the employment relationship to the extent that employees refrain from exercising rights or agree to provisions in terms and conditions of employment.

14. In the line of cases relied upon by the company the Board has looked to whether or not the objective acts of the employer (i.e. the refusal to continue to employ etc.) were revocable or irrevocable. If revocable, then clearly an inference can be drawn as to the subjec-

tive element of the definition (i.e. the compelling or inducing to refrain from exercising rights etc.) and a finding made that the refusal to continue to employ is being used as a lever to effect an alteration or modification of employment behaviour within the meaning of lock-out as set out in Section 1(1)(i) of the Act. (See *re Harry Woods Transport* case, [1976] OLRB Rep. July 341 where such an inference was drawn.) If, on the other hand, the evidence establishes that the company's decision to refuse to continue to employ is irrevocable, then it is more difficult to draw the inference that the sanction is designed to effect a modification or alteration of employment behaviour in those whom the employer has refused to continue to employ, and indeed, in a number of cases a finding that the decision of the company was irrevocable has led to a dismissal of the application. (See *Livingston Transportation Limited* case (*supra*)).

15. Does this mean that in order to establish that a lock-out has occurred a union must establish that the decision taken by the company in respect of those it refuses to continue to employ was a revocable one? The answer is no. Whereas the objective element of the definition encompasses "a refusal by an employer to continue to employ *a number of his employees*", the subjective element requires that the refusal be "with a view to compel or induce *his employees* to refrain from exercising any rights or privileges under the Act ..." The definition contemplates and catches an irrevocable decision taken by an employer to refuse to continue to employ *some* of his employees with a view to compel or induce *other* employees to refrain from exercising rights under the Act etc. This is clear from a reading of the definition and fits within the policy considerations referred to above. It is within this context that the statement in the *Milrod* decision (*supra*) must be read. If it can be shown that an employer's refusal to continue to employ a number of his employees is rooted in an anti-union animus and if there are other employees who may be influenced within the meaning of the definition, an inference can be drawn that the motive for the employer's action falls within the statutory definition of "lock-out". It can be inferred that the employer's decision is designed, at least in part, to modify or alter the behaviour or conduct of those employees who remain within his employ.

16. The onus is upon the union to establish the existence of a lock-out. It can satisfy the onus by establishing that the economic sanctions are revocable thereby allowing the Board to draw the inference that the sanctions have been designed to modify employee behaviour within the meaning of the definition. It can also satisfy the onus by establishing that the sanction, although irrevocable, was motivated by an anti-union animus, thereby allowing the Board to draw the inference that the sanctions were intended to modify the behaviour of employees other than those directly affected. The "reverse onus" which requires an employer to satisfy the Board that he has not acted out of an anti-union animus in certain unfair labour practice complaints does not prevail in a Section 83 application. In the *Milrod* case (*supra*), an application under section 83, the union was unable to discharge the onus of establishing an anti-union motive. Having regard to the different placement of the onus in a Section 79(4a) complaint and to the fact that in certain circumstances an employer's irrevocable refusal to continue to employ for an anti-union reason will not fall within the definition of lock-out, there will be situations in which the Board dismisses an application under Section 83 which would succeed if brought under Section 79 of the Act.

17. In summary, the definition of lock-out is designed to encompass employer initiatives which are motivated by a desire to compel or induce a modification or alteration in employee behaviour via-a-vis rights or privileges under the Labour Relations Act or in the

terms of employment. If the initiatives are revocable, then clearly an inference can be drawn as to motive which will bring the initiatives within the meaning of the definition. If the initiatives are irrevocable but it is established that an anti-union animus has given rise to the refusal to continue to employ and there are other employees who could be influenced to refrain from exercising rights etc., then an inference can also be drawn as to motive which will bring the employer initiatives within the meaning of the definition.

18. There is no evidence before the Board in this case which establishes that the decision of the company to terminate its bargaining unit employees was revocable upon the employees agreeing to anything or refraining from anything. Indeed, the union witness replied in the negative when asked in cross-examination if they had received any indication prior to or after receiving the notice of termination that any action on their part could change the situation. There is no evidence before the Board of employees, other than those directly affected, who might be compelled or induced within the meaning of the definition. The evidence of Mr. Brown with respect to his conversation with Mr. Pertras on August 18 suggests that the company had made a decision to contract out all of its electrical work. Even if there were bargaining unit employees with the company who could have been influenced by the termination of the employees named in paragraph 1 herein the union, which carries the legal burden in this matter, has not established that the refusal to continue to employ was motivated by an anti-union animus. There is no pattern of anti-union conduct by the employer. The evidence of the Christmas bonus and meal allowance is inconclusive at best and whereas the actions of the company in regard to these matters may or may not constitute violations of Section 70, motive is not a relevant consideration in making a finding under Section 70 of the Act. The timing of the termination was coincidental with the expiry of the company's contract with the Canada Centre for Inland Waterways (a project to which the persons terminated were assigned for the majority of their work), thereby giving rise to equally probable inferences flowing from the timing of the company's decision. Having regard to the evidence before it and to the fact that the onus is upon the union, the Board is not prepared nor can it draw an inference arising from the failure of the employer to call evidence as would cause it to impute an anti-union motive to the employer.

19. The union has failed to establish on the balance of probabilities that the refusal of the employer to continue to employ the persons named in paragraph 1 herein was designed to compel or induce those or other employees to refrain from exercising rights or privileges under the Act. The Board is not satisfied that the actions of the company fall within the statutory definition of lock-out. Accordingly, the Board must dismiss the application.

0078-77-R Association of Commercial and Technical Employees, Local 1704, C.L.C., (Applicant), v. **Parkdale Community Legal Services**, (Respondent).

Certification – Employee – Whether articling students are excluded from the Labour Relations Act.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members R. Redford and R. White.

DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER R. WHITE: October 18, 1977.

1. This case presents the Board with a novel issue. We have been asked to decide whether articling students, who may be described as lawyers-in-training, are entitled to engage in collective bargaining under *The Labour Relations Act*.

2. The articling students in this case are employed under Articles of Clerkship to the Director of Parkdale Community Legal Services, a storefront law office sponsored by the Osgoode Hall Law School. For a graduate of a Canadian Law School to be called to the Bar and enrolled as a solicitor in Ontario he must successfully complete the Bar Admission Course established by The Law Society of Upper Canada under *The Law Society Act*, R.S.O. 1970, c.238. Spending twelve months in training articled to a fully qualified solicitor constitutes the initial portion of the Bar Admission Course. Those who are engaged in this phase of the course are known as "articling students". The second and final portion of the course consists of six months of lectures, tutorial groups and examinations. (See s.26 of the Regulations made under *The Law Society Act* as amended by O. Regs. 160/73, 430/73, 983/74 and 220/75.)

3. The union has applied to be certified as the exclusive bargaining agent for all employees of the respondent in Metropolitan Toronto, save and except the Director, Associate Director, Group Leader of the Personnel Management Group, persons regularly employed for not more than 24 hours in a week, summer students, graduate students, Osgoode Hall Law School students enrolled in the Parkdale Community Legal Services academic program and persons employed for specified limited terms of employment under special funding arrangements. On May 9, 1977, the Board, on an interim basis, certified the applicant union pending a determination of whether or not the articling students employed by the respondent are precluded from inclusion in the proposed bargaining unit by the operation of section 1(3)(a) of the Act.

4. The articling students employed by Parkdale Community Legal Services,

- a) supervise the caseload work of law students and provide general assistance to the law students,
- b) draft legal instruments and act for the respondent's clients by giving advice on legal problems and representing clients in Provincial Court (Criminal and Family Division), Small Claims Court, County Court Chambers, and before administrative tribunals and

special examiners, all of which is done under the supervision of lawyers in the office,

- c) participate in community legal education, office activities, and office administration, and
- d) assist staff lawyers with cases in the courts.

5. Before addressing the question of whether the articling students fall within the professional exclusion, we comment briefly on the applicability of the section 1(3)(b) exclusion in the circumstances of this case. Section 1(3)(b) excludes from the definition of "employee" any person who either exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations. The parties in this case have agreed that the articling students do not exercise managerial functions; no question has been raised as to their being employed in a confidential capacity in matters relating to the labour relations. The Board, therefore, is satisfied that articling students at Parkdale are not precluded from inclusion in the proposed bargaining unit by the operation of section 1(3)(b) of the Act.

6. The more difficult question concerns the interpretation of the professional exclusion contained in section 1(3)(a) which reads as follows:

"Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

who is a member of the architectural, dental, land surveying, legal or medical profession entitled to practise in Ontario and employed in a professional capacity."

7. Over the years the place of professionals in collective bargaining has been the subject of much discussion. Among reasons that have been suggested for the statutory exclusion from collective bargaining in Ontario of members of certain professions are the following: *firstly*, that while Ontario's early labour laws allowed these professionals to bargain, the professionals themselves sought exclusion because they felt their separate community of interest was not being sufficiently protected; *secondly*, a belief among some professionals that it is unethical for service-oriented professions having a statutory monopoly over the practice of a profession to be able to withdraw their services from the public; *thirdly*, a concern that it is undignified for members of professions to engage in collective negotiations over monetary issues; *fourthly*, a belief that professionals don't need the assistance of collective bargaining because normally professions have their own self-regulating associations; and *fifthly*, a concern that even if it is appropriate for professionals to organize, the existing labour legislation, designed with the ordinary employee in mind, would be inappropriate for professionals without fundamental alterations – including perhaps, no-strike provisions, voluntary inclusion under the terms of a collective agreement and restricted managerial definitions. *Lastly*, it has been suggested that professionals are unsuited to collective bargaining because they are an "upwardly mobile" breed and possess a fiercely independent approach to their work resulting in a closer identification with management than with employees and unions.

8. It should be stressed that the concern of this Board, however, is not whether, as a matter of policy, articling students are among professionals who should or should not fall within the ambit of *The Labour Relations Act*. That is a question for the Legislature. The sole concern of this Board is whether the Legislature has excluded articling students from the operation of the Act by virtue of section 1(3)(a). We turn then to apply the statute to the facts at hand.

9. For an articling student to be excluded from collective bargaining under *The Labour Relations Act*, three conditions must be met. The individual must be:

- a) a member of the legal profession,
- b) entitled to practise in Ontario, and
- c) employed in a professional capacity.

10. The applicability of these three conditions to articling students cannot be determined without an examination of *The Law Society Act*, the Act governing the legal profession in Ontario. It is within that statute that the legislative imperatives regarding membership in the profession and entitlement to practise are found.

11. Are articling students members of the legal profession within the meaning of section 1(3)(a) of *The Labour Relations Act*? *The Law Society Act* provides articling students with a qualified membership in the Law Society: Section 28(d) states that,

the persons,

- (i) who are students-at-law in the Bar Admission Course on the 1st day of October, 1970, or
- (ii) who after that day become students-at-law in the Bar Admission Course,

are student members with the rights and privileges prescribed by the rules.

At the same time, however, *The Law Society Act* specifically excludes student members from its definition of "member" of the Law Society. Section 1(c) provides as follows:

"member" means a member of the Society and includes a life member but does not include an honorary member or a student member.

Section 10 of *The Law Society Act* states that the benchers of the Law Society shall govern the affairs of the Society. Section 15(1) of the Act provides that the benchers are to be elected from among and by members of the Law Society:

15-(1) An election of benchers shall be held in 1971 and in every fourth year thereafter at each of which forty benchers shall be elected by secret ballot from and by the members in accordance with this Act and the rules.

In view of their exclusion from the definition of “member” of the Law Society as set out above, articling students are unable to participate in the governing process of the Society either through voting for or becoming a bencher.

12. The question is whether the phrase “member of the...legal...profession” in section 1(3)(a) of *The Labour Relations Act* includes any type of member of the Law Society or only those who are defined as “member” of the Law Society under *The Law Society Act*. Does “member” under *The Labour Relations Act* exclude, in other words, persons, such as articling students, who are explicitly carved out of the Legislature’s own definition of “member” of the Law Society?

13. The language of *The Labour Relations Act* is not entirely unambiguous. However, in the face of such a clear definition of “member” of the Law Society assigned by the Legislature in *The Law Society Act*, we hesitate to assume that the Legislature would intend the phrase, “member of the...legal...profession”, in *The Labour Relations Act* to have a broader meaning than its own definition of “member” of the Law Society in *The Law Society Act*.

14. This hesitation is reinforced by the understanding that to give “member” under *The Labour Relations Act* a broader interpretation than “member” under *The Law Society Act* would be to exclude from collective bargaining persons who are not yet full members of their profession and can neither enjoy the full benefits of their professional association nor have an effective input into its operation. The existence of professional associations and an assumed lack of need for collective bargaining among their members provides a fundamental pillar of support for the professional exclusion under *The Labour Relations Act*. In the absence of clear language to the contrary, we are not persuaded that the Legislature intended to exclude from collective bargaining persons who still stand at the door of their profession and, until they become full members of their professional association, lack effective means of self determination through that association.

15. We find, therefore, that articling students are not members of the legal profession within the meaning of section 1(3)(a) of *The Labour Relations Act*. The disposition of this case, however, does not depend entirely upon this finding. The answer to the question of whether or not articling students are entitled to practise in Ontario within the meaning of section 1(3)(a) of the Act is equally significant.

16. *The Law Society Act* provides in section 28(c) that those persons who fall within the definition of “member” under *The Law Society Act* are entitled to practise law in Ontario as barristers and solicitors. The Act does not provide, however, that student members are entitled to practise law and section 50 prohibits, except where otherwise provided by law, any person who is not a member from practising as a barrister or solicitor: Section 50 reads,

50-(1) Except where otherwise provided by law, no person, other than a member whose rights and privileges are not suspended, shall act as a barrister or solicitor or hold himself out as or represent himself to be a barrister or solicitor or practise as a barrister or solicitor.

Section 1 of *The Solicitors Act*, R.S.O. 1970, c.441 further provides that,

If a person, unless himself a party to the proceeding, commences, prosecutes or defends in his own name, or that of any other person, any action or proceeding without having been admitted and enrolled as a solicitor, he is incapable of recovering any fee, reward or disbursements on account thereof, and is guilty of a contempt of the court in which such proceeding was commenced, carried on or defended, and is punishable accordingly.

17. Does “entitled to practise in Ontario” in section 1(3)(a) of *The Labour Relations Act* mean “entitled to practise in Ontario as a barrister or solicitor” or does it extend to a more general entitlement to engage in restricted areas of legal representation?

18. In *The Law Society Act*, the word “practise” is generally used in concert with the phrase, “as a solicitor” or “as a barrister” or words to that effect. (See for example, sections 10, 28(c) and 50.) Because “practise” is not used independently it does not readily invite a more general interpretation that would extend to a limited entitlement to engage in only some forms of legal representation. As well, Article 4 of the Articles of Clerkship entered into by the solicitor and the articling clerk suggests that the articling student is not yet himself practising law, but being trained to do so:

4. “The Solicitor covenants with the clerk,

- (a) to the best of his/her ability to teach and instruct the clerk in the practice or profession of a solicitor...”

19. Having regard to the use of the word “practise” in *The Law Society Act* as well as the scheme and purpose of *The Labour Relations Act*, we find that the words “entitled to practise in Ontario” encompass only those persons who are fully entitled to practise law in Ontario as a barrister and solicitor. An articling student’s entitlement to engage in legal representation is strictly circumscribed by *The Law Society Act* and *The Solicitors Act*. It falls short of a full entitlement to practise law as a member of the legal profession. Accordingly, we find that articling students are not “entitled to practise in Ontario” within the meaning of section 1(3)(a) of *The Labour Relations Act*.

20. It is arguable that articling students may meet the final criterion set out in section 1(3)(a), that is, being employed in a professional capacity. However, because of the Board’s decision that articling students are neither members of the legal profession nor entitled to practise in Ontario within the meaning of section 1(3)(a), we need not determine that issue.

21. For the reasons set out above, therefore, we find that the articling students employed by the respondent are employees under the Act and are, therefore, entitled to engage in collective bargaining.

22. We note by way of comment that although articling students are professionals in the broad sense of the word, some of the concerns over professionals engaging in collective bargaining may be less applicable to them. For example, insofar as students are not yet barristers and solicitors, the concern for maintaining adequate service to the public is less present. To the extent that articling students are not full members of The Law Society of Upper Canada and cannot vote for the benchers who govern the affairs of the Society, the articling

students cannot provide for their own working conditions through their professional association. Moreover, to the extent that articling students are not self-employed practitioners or consultants, they may be exposed to the same employment risks as any other wage or salary earner. We note as well that to the extent that articling students may be viewed as inappropriate subjects for collective bargaining because they may exercise managerial functions or be employed in a confidential capacity in matters relating to labour relations, they will be subject to the appropriate exclusion under section 1(3)(b) of the Act.

23. Apart from the section 1(3)(a) issue, the parties were in agreement on the composition of the bargaining unit; no question was raised as to the articling students' community of interest with other employees in the unit. In the circumstances of this case, the Board is prepared to defer to the agreement of the parties. This decision should not be seen, however, as setting a precedent in all future cases for the inclusion of articling students in all-employee units. The dictates of *The Law Society Act* requiring an articling student to complete twelve consecutive months of articles as well as the "professionalism" of the articling student (however that may be defined) may in some circumstances raise legitimate questions as to the extent to which the articling students share a community of interest with some or all of the other employees in a proposed unit. Issues of that kind will necessarily be dealt with as they arise in future cases.

24. In this case, having regard to the agreement of the parties, the Board finds that all employees of the respondent in Metropolitan Toronto, save and except the Director, Associate Director, Group Leader of the Personnel Management Group, persons regularly employed for not more than 24 hours per week, summer students, graduate students, Osgoode Hall Law School students enrolled in the Parkdale Community Legal Services academic program and persons employed for specified limited terms of employment under special funding arrangements, constitute a unit of employees of the respondent appropriate for collective bargaining.

25. For purposes of clarity the Board notes that lawyers entitled to practise law in the Province of Ontario and involved in the respondent's delivery of legal services are, of course excluded by the operation of section 1(3)(a) of *The Labour Relations Act*.

26. A certificate will now issue to the applicant.

DECISION OF BOARD MEMBER R. REDFORD:

1. The issue before us in this case is the interpretation and application of section 1(3)(a) of *The Labour Relations Act* which excludes from the scope of the Act any person who is:

- a) a member of the legal profession,
- b) entitled to practise in Ontario, and
- c) employed in a professional capacity.

The majority has asserted that because an articling student-at-law is neither a member *with full status* in the profession, nor entitled to practise *as a barrister or solicitor* in Ontario, he

cannot be excluded from the Act. With this conclusion I respectfully disagree. Having regard to the labour relations considerations upon which section 1(3)(a) is based and the unusual employment position of the articling student, I cannot accept that the Legislature intended their inclusion in a formal collective bargaining structure.

2. The circumstances of the articling law student are unique. As has been pointed out in the decision of the majority, the articling law student is a graduate of an accredited Canadian law school who has been given student membership status under section 28(d) of *The Law Society Act*. He is entitled to exercise his legal competence in a specified range of circumstances – as set forth in the notice to the profession dated June 22, 1971. A student may represent clients under the general supervision and control of the principal and his services may be billed for under the Legal Aid Act. There is no doubt that the articling student can “practise” within these parameters and can act on behalf of clients under the general guidance and supervision of the principal. It is not the kind of supervision normally found in an industrial environment, nor should it be. In fact, it more closely resembles the kind of supervision that might be given a junior lawyer who recently became associated with a large established firm. There too, a junior solicitor will usually be acting on behalf of firm clients rather than his own – at least in the initial stages of his practice. Therefore, while I recognize that the definition of entitled to practise with all rights and privileges would describe the practise of a solicitor, it does not persuade me that an articling student is not entitled to practise his professional skills as those terms are used within *The Labour Relations Act*.

3. There is no doubt that the situation of the articling student involves both employment and educational aspects. He undergoes a period of “on the job training” as part of an established educational program and thus occupies a middle position in the transition from student to full professional status. Nevertheless, both he and his principal are engaged in serving the needs of clients and it is unlikely that a client would expect his relationship or contact with an articling student to be different from the relationship which he has with the principal or another member of the firm who is a fully qualified lawyer. One would expect the same application of professional skills to the legal problem, the same assumption of professional responsibilities, and the same solicitor-client privilege (which as a matter of law appears to apply to a client’s relationship with an articling student). The client is entitled to expect the same professional and ethical standards as would apply to a barrister and solicitor, and within the range of areas in which a student is entitled to practise, the client is entitled to a reasonable standard of professional competence. In this sense, the student members of the profession are both entitled to practise law, and employed in a professional capacity; and, accordingly, they do not fall within the scope of the exclusion set out in section 1(3)(a) of *The Labour Relations Act*.

4. The majority has examined the statutory framework governing the legal profession and has correctly concluded that articling students do not enjoy full membership status, nor are they entitled to practise as a barrister or solicitor until their training is completed and they have been formally “called” to the Bar and enrolled as a solicitor of the Supreme Court of Ontario. While I agree with this conclusion, I do not agree that it disposes of the question before us. I would ascribe a broader meaning to section 1(3)(a) than the narrow technical definition preferred by the majority. Webster’s Seventh New Collegiate Dictionary defines professional in part as being “characterized by or conforming to the technical or ethical standards of a profession”. The American Heritage Dictionary definition

refers to "one who has an assured competence in a particular field or occupation". As I have already indicated, the general perception of the client is that the articling student is associated with his principal in the practise of law and engaged in a professional capacity in respect of those tasks which he is allowed to perform.

5. In reaching its conclusion, the majority has relied almost exclusively on criteria derived from the statutory framework governing the profession. In my view this approach is too narrow and ignores the unusual character of the employment relationship of articling students. Articling students are normally employed for a maximum period of twelve months and *will never be employed again* in that capacity. Moreover, their concerns are quite different from those of legal secretaries, title searchers, law clerks, etc. even where their job functions may on occasion be similar to these "paralegal personnel". Because of the short tenure of the students' employment and their special relationship with their principal, they have a different community of interest from that of other employees; yet, at the same time, it is difficult to envisage them participating in any collective bargaining unit when the entire membership of that unit would turn over every twelve months. These obvious structural impediments to the creation of a collective bargaining relationship reinforce my view as to the intended scope of section 1(3)(a) of the Act.

6. In summary, therefore, I would find that articling students-at-law are members of the legal profession as broadly defined; are entitled to practise in Ontario and in that practice are employed in a professional capacity, and subject to the ethical and professional standards of all members of the profession. Accordingly, I would find that they are intended to be excluded from the Act by virtue of section 1(3)(a).

0819-77-R Labourers' International Union of North America, Local 183, (Applicant), v. Mor-Alice Construction Limited Philmor Developments Limited, (Respondents).

Certification – Effect of previous unsuccessful applications – Whether Board will impose a bar.

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. D. Bell and R. H. White.

APPEARANCES: S. B. D. Wahl and L. Costaldo for the applicant; Edward T. McDermott and James Hassell for the respondents.

DECISION OF THE BOARD: October 6, 1977.

1. The Board finds that this is an application for certification within the meaning of section 108 of The Labour Relations Act. It is the third in a series.

2. Two previous applications were made in respect of the same employees by the applicant within this year. They were dismissed on May 31, 1977 (File No. 0193-77-R) and August 22, 1977 (File No. 0534-77-R) respectively. In both prior applications the applicant

requested leave to withdraw after the Labour Relations Officer appointed by the Board had convened meetings of the parties. According to its policy expressed in Practice Note No. 7 the Board dismissed the applications.

3. After the dismissal of the second application the respondent asked the Board to impose a six month bar on any further application by the union. That request was denied. In its decision dated September 2, 1977 the Board reviewed its practice as expressed in *Patchoque Plymouth Hawkesbury Mills*, [1972] OLRB Rep. July 747, *J. W. Crooks Company*, [1972] OLRB Rep. Feb. 126 and the *Mathias-Ouellette* case, 56 CLLC ¶18,026, and concluded that the principles in those cases were not applicable.

4. The respondent has requested the Board to dismiss this application and impose a bar on the strength of the same facts that were the basis for its earlier request for the bar and one further fact which was apparently not known to the panel of the Board which rendered the decision denying the bar on September 2, 1977. It appears that the panel in that case was not made aware that the request to withdraw the second application was made several days after the third application (i.e. the instant application) was filed.

5. The respondent claims that that fact brings this case within the ambit of section 92(3) which provides:

92 (3) Notwithstanding sections 5 and 49, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit or for a declaration that the trade union no longer represents the employees in a bargaining unit and a final decision of the application has not been issued by the Board at the time a subsequent application for such certification or for such a declaration is made with respect to any of the employees affected by the original application, the Board may,

- (a) treat the subsequent application as having been made on the date of the making of the original application;
- (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
- (c) refuse to entertain the subsequent application.

Counsel for the respondent submits that this is a case for the application of subsection (c) and that this application should accordingly be dismissed and a bar imposed. In the alternative the employer urges the Board to conduct a representation vote among the employees concerned.

6. In *The Watson Manufacturing Company of Paris Limited*, [1968] OLRB Rep. Aug. 441 at p. 444 the Board had occasion to consider the meaning and application of section 92(3) (then section 77(3)) of the Act.

"10. ... Where a subsequent application is made during a time when the Board is seized with an application for certification which has not been disposed of, the Board has three courses of action to follow under the provisions of section 77(3) of the Act. The Board may 'treat the subsequent application as having been made on the date of the making of the original application' pursuant to the provisions of section 77(3)(a). The Board normally adopts this course of action when the subsequent application is made on or before the terminal date of the earlier application.

11. The second course of action open to the Board is to 'postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application', under section 77(3)(b). The Board adopts this course of action in cases where the subsequent application is made after the terminal date of the earlier application.

12. The final course of action which is authorized by section 77(3)(c) is to 'refuse to entertain the subsequent application'. This course of action is adopted where the Board proceeds under section 77(3)(b) and the Board in its disposition of the earlier application certifies the applicant in the earlier application. When the Board considers the subsequent application it must do so 'subject to any final decision issued by the Board on the original application'. Where the Board has certified the applicant in the original application, the Board is then authorized to 'refuse to entertain the subsequent application'. . . ."

7. That passage reflects the established practice of the Board in applying section 92(3) of the Act. Before its enactment (see S.O. 1961-62 c. 68 s.12(3)) the Board did not have express authority to dismiss a second application in the event of an overlap in filing dates; section 92(3) gave the Board the facility to deal with multiple applications on a "first come first served" basis. Here two overlapping applications were made by a single applicant. There is nothing in the meaning or purpose of section 92(3) of the Act to suggest that in that circumstance the later application should automatically be dismissed.

8. Multiple applications may form the basis for the imposition of a bar where they become unduly vexatious or abusive of the Board's process (see e.g. the *Crooks* case, *supra*). But abuse of process is not to be inferred automatically from the making of several applications, even where slight overlap occurs, especially in the construction industry where the work force fluctuates day to day and time can be of the essence in filing an application. Each case must necessarily be evaluated on its own merits.

9. Having regard to the facts of the instant case the Board is satisfied that the three day overlap in applications has not substantially prejudiced the employer or the employees. The employer's request for a dismissal is therefore denied.

10. The alternative motion for a representation vote is likewise dismissed. Counsel for the employer has asked the Board to infer that the proximity in time of the three applica-

tions has confused the employees as to their true wishes or as to their ability to make representations to the Board in that regard in the instant application. In view of the fact that the Form 52 Notice to Employees of this application was duly posted on the 25th of August, 1977 and that no employees have themselves signified to the Board any confusion as to its meaning, we are not prepared to give effect to the suggestions of the respondent.

11. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

12. Having regard to the agreement of the parties, the Board further finds that all construction labourers employed in residential construction, employed by the respondents, Mor-Alice Construction Limited and Philmor Developments Limited in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen, persons above the rank of non-working foremen, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 2, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

“M. G. Picher”
for the Board

October 6, 1977

0182-77-U Rupert S. Martin, (Complainant), v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America, (Respondent).

Duty of Fair Representation – S. 79 – Effect of failure of union to refer member to jobs – Whether union conduct arbitrary discriminatory or in bad faith – Whether contravention of section 60a.

BEFORE: Ian C. A. Springate, Vice-Chairman.

APPEARANCES: Adrian Hill appearing for the complainant; Harold F. Caley and Fred Leach appearing for the respondent.

DECISION OF THE BOARD: October 6, 1977.

1. The name "United Brotherhood of Carpenters and Joiners of America Local 27" appearing in the style of cause of this application as the name of the respondent is amended to read "The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America".

2. This is a complaint under section 79 of The Labour Relations Act which alleges that the respondent has violated sections 60 and 60a of the Act. At the hearing counsel for the complainant relied only upon the alleged violation of section 60a. Section 60a provides as follows:

"60a. – Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith."

3. The complainant is a member of Local 27 of the United Brotherhood of Carpenters and Joiners of America, which local is in turn a constituent local of the respondent council of trade unions. The respondent was at all material times party to a collective agreement with an accredited employers' organization which provided that employers represented by the employers' organization would, except for certain specific exceptions, employ carpenters only through the respondent's offices. The evidence establishes that notwithstanding the strict requirements of the collective agreement, the respondent has a practice of permitting carpenters who are members of its constituent locals to arrange for employment on their own initiative and that in such cases the respondent will then issue the member a referral slip addressed to the employer concerned. In conjunction with this arrangement the respondent also operates a "hiring hall", to which employers can telephone and request that the respondent send out union members capable of performing certain classifications of work. During the peak construction period of the summer and early fall the hiring hall accounts for only some twenty per cent of the work done by carpenters belonging to constituent locals of the respondent. However, during the winter months this figure rises to about sixty per cent.

4. This complaint arises out of a refusal on the part of the respondent to refer the complainant to any employers who contacted the respondent's offices requesting that the respondent supply them with men. The decision not to refer the complainant was made in December of 1974, which was prior to the enactment of section 60a (see S.O. 1975 c. 76 section 16), although the refusal to refer the complainant did continue subsequent to the enactment of the section. Some months prior to the filing of this complaint the respondent agreed to again begin referring the complainant to work.

5. At the hearing counsel for the respondent contended that having regard to the fact that the original decision not to refer the complainant to work had been made prior to the enactment of section 60a, no violation of that section could have occurred. In the alternative, he contended, the complaint should have been filed shortly after the enactment of section 60a. The Board reserved its decision concerning the timing of the filing of the complaint and heard evidence and argument relating to the merits of the complaint. Having re-

gard to the Board's determination with respect to those merits, there appears to be no need to decide the question as to whether the complaint should be barred because of the delay in its being filed.

6. Although not argued for by counsel for the complainant, the complainant himself during his testimony raised the possibility that the respondent's actions may have been motivated by the fact that the complainant is black. On the basis of the evidence led at the hearing, however, the Board is satisfied that the respondent's actions were motivated by considerations other than the racial background of the complainant. Although the Board did not rely on this fact in reaching the above conclusion, but instead relied only on the evidence led at the hearing, it is perhaps worth noting that the complainant did file a complaint with the Ontario Human Rights Commission alleging that the respondent's actions had been motivated by the complainant's racial background. The commission, however, after conducting an investigation into the matter concluded that the respondent had not discriminated against the complainant because of his race.

7. The decision not to refer the complainant to any employers contacting the respondent's offices for carpenters was made by Mr. William W. Morris, who at the time was Secretary-Treasurer of the respondent and as such was responsible for its day-to-day operations. Mr. Morris testified that he understood that at the relevant time he had the authority to refuse to refer any union member to employment, although any action taken in this regard could be referred by the member's local union to the District Council and that the delegates to the District Council could overturn his decision. The actual decision of Mr. Morris was that the respondent would not on its own motion refer the complainant to any work, but that if the complainant could arrange for employment directly with an employer then the complainant would be provided with the necessary referral slip.

8. According to Mr. Morris the decision not to refer the complainant to any work was triggered by a complaint to the respondent by an employer concerning the quality of work performed by the complainant. The complainant had been referred to the employer by the respondent. It is undisputed that on the day in question the complainant arrived at the employer's job site approximately one hour late and that within two hours of his arrival the employer voiced his displeasure with the quality of the work being performed by the complainant and ordered him off the job site. Following this event Mr. Morris reviewed the complainant's past work performance in consultation with certain other officials of the respondent. This review covered an unfortunate recent history on the part of the complainant of being dismissed by employers prior to the completion of the work for which he had been hired, as well as a number of complaints to the respondent from employers concerning the complainant's work performance. Mr. Morris stated that he based his decision not to refer the grievor to any jobs on the complainant's work record and on a need to be fair to both employers and other union members. This latter reference relates to the fact that although the respondent generally refers men to jobs on a rotational basis – subject to their being registered to do the particular class of work involved – where a man is on a job for less than five days his name will generally be refiled at the top of the rotation list rather than at the bottom. According to Mr. Morris, because of the number of times that the complainant had been dismissed from jobs within the five day period his name came to appear at the head of the rotation list a disproportionate number of times. It should be noted that although the complainant indicated that he had not been informed of any complaints to the respondent from employers concerning his job performance prior to the day in question, he did concede that he had been laid off from jobs "quite often".

9. Prior to Mr. Morris reaching a final decision not to refer the complainant to any work he discussed the matter with the complainant at which time he reviewed with him his past work record. The complainant was given an opportunity at that time to put forward his own position. During his cross-examination the complainant stated that he had not raised the issue of Mr. Morris' decision with his own local union because he did not think it would have been of any use.

10. There can be no doubt that the ability of union officials to refuse to refer a member to any work under a "hiring hall" arrangement contains the potential for abuse. However, the Board is of the view that each such refusal does not necessarily constitute a violation of section 60a, but that rather each case must be assessed on its own merits.

11. The construction industry in this province is characterized by a large number of contractors and sub-contractors whose need for skilled manpower is forever fluctuating. The hiring hall run by a trade union in such circumstances assists union members to move into new jobs as old ones come to an end. Where there is insufficient work to keep all of the membership employed, the hiring hall arrangement will also generally serve to allocate the available work on a more equitable basis than otherwise would be the case. Employers in the construction industry also generally benefit from the operation of a union hiring hall in that it usually ensures that they can obtain a supply of manpower on very short notice. Further, and at least as equally important, an employer can generally be assured that the workers sent out by the union will be capable of performing the work at hand in a competent and efficient manner. When a union refers a member to an employer it is, in effect, making a declaration to the employer that the member in question possesses the necessary skills and ability to do the work involved.

12. The benefits to employers of a union run hiring hall will obviously not be as great if the members being sent out by the union are not, in fact, capable or willing to competently perform the work at hand. Should this occur on a wide scale it stands to reason that employers will become increasingly resistant to any requirement that they hire only union members. Further, in circumstances such as exists here where employers are free to either utilize the hiring hall or arrange for employment directly with union members, it seems likely that before very long the hiring hall would be resorted to with greater and greater infrequency. This latter development, in turn, would mean that members would face increased difficulty in finding new jobs and that there would be a less equitable distribution of available work.

13. It follows from these facts that it is to the benefit of unions in the construction industry, as well as to the benefit of their membership generally, that only men capable and willing to perform the work at hand are referred to employers. On occasion it may become necessary to examine the work performance of a particular member and in so doing to balance the interests of that member against the interests of the membership generally. The Board is of the view that the Act neither prohibits this balancing of interests nor does it guarantee a union member continued access to the union's hiring hall. What it does guarantee, however, is that when the union does make a decision not to refer a member to work it will do so in good faith and in a non-discriminatory, non-arbitrary fashion.

14. In the instant case the Board is satisfied that Mr. Morris, acting on behalf of the respondent, acted in good faith in reaching the decision not to refer the complainant to

work. As noted above the respondent remained willing to provide the complainant with a referral slip for any work he was able to obtain on his own initiative. The Board is also satisfied that Mr. Morris did not discriminate against the complainant in the sense of treating him differently than other union members on the basis of non-relevant considerations.

15. Counsel for the complainant submitted that the Board should find that the respondent acted in an arbitrary fashion because the original decision not to refer the complainant to work had not been accompanied by "sufficient formalities" and in particular a prior written notice to the complainant as to what action was being considered. With this submission the Board is unable to agree. Here prior to Mr. Morris reaching any final decision the complainant was given an opportunity to state his position and to review with Mr. Morris the facts upon which Mr. Morris ultimately made his decision. Further, the complainant had the right to seek by way of his local union to have Mr. Morris' decision overturned, a right he did not take advantage of. That this decision making process was not surrounded by greater formality does not necessarily mean that the result was an arbitrary one, and indeed in the circumstances of this case the Board is satisfied that Mr. Morris did not act in an arbitrary fashion.

16. In his submissions counsel for the complainant raised the possibility that perhaps Mr. Morris had in fact lacked the authority to decide on his own that the complainant should not be referred to work, although the only evidence before the Board in this regard was Mr. Morris testimony that he felt that he did possess such authority. It appears that the business agents who staff the respondent's hiring hall operation also felt that Mr. Morris had that authority in that they carried out his decision that the complainant not be referred to any work. Having regard to his position with the respondent and his apparent authority to control the operations of the hiring hall, the Board is satisfied that the actions of Mr. Morris are to be attributed to the respondent itself. If under the respondent's constitution or bylaws the decision made by Mr. Morris should in fact have been made by some other person or body (and the Board would note that there is no evidence before it to this effect) then it was always open for the complainant, as a union member, to seek to ensure that the constitution or bylaws were being adhered to either by going through the internal process of the union or possibly by taking the matter into the Courts. While this Board has the authority under the Act to determine whether or not a union has violated its duty under section 60a, it does not have the authority to police union constitutions and bylaws. This is not to say, however, that where a union's constitution or bylaws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or bylaws, that those actions might not be a relevant factor in determining whether or not a breach of section 60a has occurred. Mr. Morris' actions in this case clearly did not come within this class of conduct.

17. Having regard to the above considerations, the Board is satisfied that in reaching the decision not to refer the complainant to work the respondent, acting through Mr. Morris, did not act in a manner that was arbitrary, discriminatory or in bad faith. The Board is further satisfied that the continuing effect of this decision after the enactment of section 60a likewise did not constitute arbitrary, discriminatory or bad faith conduct on the part of the respondent.

18. Before leaving this matter the Board would again note that prior to this complaint being filed (and four months after the Human Rights Commission had turned down the

complaint to that body) the respondent agreed to again begin referring the complainant to work. It is to be hoped that this action on the respondent's part will prove to be to the benefit of both the respondent and the complainant.

19. Having regard to the determination in paragraph 17 above, this complaint is hereby dismissed.

"Ian C. A. Springate"
for the Board

October 6, 1977

0776-77-R Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association, (Applicant), v. **Kernohan Lumber & Sash Co. Limited**, (Respondent), v. Group of Employees, (Objectors).

Certification – S. 79 – Whether employer conduct is a contravention of the Act – Whether circumstances justify certification pursuant to section 7a.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members D. B. Archer and F. W. Murray.

APPEARANCES: *Betty Henry and Clifford Evans for the applicant; R. B. Livingstone, Esq. and Jerry Hernohan for the respondent; C. Bryce Lockhart and Lester Fleischauer for the objectors.*

DECISION OF THE BOARD: October 12, 1977.

1. The name: "Kernohan Home Centre Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Kernohan Lumber & Sash Co. Limited".

2. This is an application for certification.

3. On calling the application for hearing a group of employees who had filed a statement of desire through a Mr. Sam Habash made no appearance and, additionally the statement had not been filed with the Board within the time limits prescribed and accordingly the statement is not entertained by the Board. It should be noted, however, in the light of subsequent events, that the untimely statement of desire had been prepared for Habash by Lockhart.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

5. The Board further finds that there are two units appropriate for collective bargaining and these units are individually defined by the Board as:

- a) All employees of Kernohan Lumber & Sash Co. Limited at London, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, part-time employees regularly employed for twenty-four hours per week or less and students employed during summer vacation.
- b) All part-time employees regularly employed for twenty-four hours per week or less and all students employed during summer vacation of the Kernohan Lumber & Sash Co. Limited at London, Ontario.

6. At the hearing a challenge by the applicant of the employer lists resulted in the appointment of an examiner to inquire into the duties and responsibilities of three named employees. Following the taking of evidence before the examiner, the applicant's challenge was withdrawn.

7. In the "all-employee" unit the applicant filed evidence of membership on behalf of fourteen employees amongst the total twenty-eight employees employed in the unit.

8. In the "part-time and students unit" the applicant filed evidence of membership on behalf of two employees amongst the total four employees employed in the unit.

9. Because of the level of the applicant's membership support it is unnecessary for the Board to arrive at any conclusion as to the weight to be accorded to the statement of desire filed on behalf of a group of employees by Mr. Bryce Lockhart. However, the applicant argues that there have been contraventions of the Act such that the true wishes of the employees are unlikely to be ascertained through a representation vote and that, therefore, the Board should exercise its discretion under section 7(a) of the Act. The origin and execution of the above statement of desire is one of the circumstances to be evaluated on determining whether there have been contraventions of the Act.

10. Mr. Bryce Lockhart represented the group of employees signing the petition and gave evidence before the Board. Mr. Lockhart has been employed for two years and is listed as a millwork layout man on the employer's lists. Lockhart is paid on a weekly basis and his duties include estimating jobs for customers, lay-outs, purchasing materials and co-ordinating their arrival and releasing the order to the shop.

11. Lockhart testified that he was approached by a number of employees to draw up the petition which he did at home. Lockhart states that he was approached about the petition before the Board's Notice to Employees about the petition before the Board's Notice to Employees was posted on August 15th and that knowledge of the impending application was "well around" at that time. The arrangement was that he would meet with the others in the parking lot next morning early before going to work. The meeting did take place at 6.00 a.m. on August 16th and at that time five employees in addition to Lockhart affixed their signatures. The arrangement apparently was that Lockhart was to be in charge of the petition and other employees would be referred to him. Lockhart testified that he was accompanied by a Mr. L. Fleischauer, a stickerman, on all occasions and that both he and Fleischauer witnessed all signatures, some of which were secured in the parking lot as previously noted, five through home visitations and the remainder "otherwise". After its completion, Lockhart typed the date "August 19th" on it and forwarded it to the Board.

12. Lockhart testified that in a conversation with Mr. Kernohan, President of the respondent, prior to his being approached by the employees. Kernohan had asked him if he knew about the union, to which Lockhart replied that "one of the men had just told me". He also testified that the day after the petition started circulating he told Kernohan that there was a petition going around to which Kernohan responded "fine". He further testified that on the afternoon of August 18th, he showed the signed petition to Kernohan. Kernohan, in his testimony, when asked whether he was aware that Lockhart was organizing against the union replied "I was aware something was going on. The word was out that a petition was around but I didn't remember who told me". He further testified that he did not instruct Lockhart or give him any guidance and that in respect to being shown the petition that he had never requested to see it. Lockhart just brought it in.

13. Kernohan testified that he had posted the Notice to Employees of Application after lunch on August 15th. He also testified that at 3.45 p.m., during the break period, he was in the canteen where the notice was posted and had a conversation with two employees, Brant and Reiber, who asked the meaning of the green notice. Kernohan states that he told the men they could read the notice for themselves but there are a number of things they could do and "if employees want to speak out they must do it that way". He concedes he may have said "what benefit is the union to you". Another employee, Haggith, who overheard the conversation states that Kernohan said "what's going to happen now is that the old timers are going to start a petition against the union. What benefits, what raises can the union get you". Having had the advantage of observing the witnesses we find that Kernohan did in fact know, as of the afternoon of August 15th, of the existence of the petition which had just come into existence and was aware of the part that Lockhart was playing.

14. Lockhart when questioned as to the reason for showing the petition to Kernohan stated that "I thought it was only fair that he should see it" and further that all the signatories were advised prior to signing that Kernohan would see the petition. Fleischauer, who accompanied Lockhart, however, states that neither he nor Lockhart told signatories that Kernohan would see the petition and that in fact he himself had just learned a few days before the hearing that Kernohan had seen it.

15. Kernohan's conversation with Lockhart as to whether he knew of the union, Lockhart's reporting that a petition was circulating and Lockhart's presentation of the petition to Kernohan leads to the clear inference that Lockhart felt he was performing his "master's bidding".

16. Evidence was also given by Gary Moore who was hired as a part-time employee and so worked for two days when he was invited to become a full-time employee as of August 15th. Moore worked as a yardman under supervision of the foreman, George Taylor.

17. Moore testified that on August 16th he was approached in the yard by Lockhart who asked "who I was and if I was working there", to which Moore responded affirmatively. "Taylor told Lockhart that I had started full-time that week". Lockhart stated he needed Moore's signature and when asked "why", he showed Moore the petition. Moore demurred that he had only been there a couple of days to which, Moore testified that Lockhart responded, "to be honest with you, if you don't sign the petition you probably won't be here a couple more". Moore states Taylor was just behind him and he would think, within hearing distance. Moore then took the paper over to a table and signed it. Taylor in his tes-

timony confirms that Lockhart did come into the yard and asked if there was a Gary Moore there but states that he did not hear the Lockhart – Moore conversation and did not see Moore sign the paper. Lockhart, who was present during Moore's testimony, did not take the stand to rebut Moore's testimony. Moore voluntarily left his employment at Kernohan on August 30th.

18. Tim McManus was hired on October 6, 1976 to work part-time while going to school (1-1/2 hours daily after school and all day Saturday) and worked full-time during the summer. On August 18th, a notice was posted on the time clock stating that once school started all students would work only on Saturdays. Kernohan testified that the decision had previously been made not to continue employing students after school because it hadn't worked out and that the notice was posted on August 18th because the Haggith incident had brought to mind the need for Saturday students. McManus ran into Kernohan in the yard and asked him why the change in student hours. According to McManus, Kernohan responded with "you young guys started all the trouble. If the union does get in I'll just close the mill down". Kernohan's testimony is that he could have made that statement to McManus and that he could have made the statement to others also, but he couldn't recall. In Kernohan's words "my conversation with McManus was somewhat similar to what he said. I can't paraphrase it any better". It should be noted that at one stage of his testimony, Kernohan said he had never used the words "shut it down" in those words but that he could have said something like that because he was quite emotional the first day. It should also be noted that the McManus conversation took place not on the first day, but several days later.

19. Mr. Ron Haggith, who started work in March, 1974, testified to the conversation between Kernohan and two employees, Brant and Reiber, on August 15th in the cafeteria, and this has been dealt with in paragraph 13 above. Haggith was quite active in the organizational campaign and engaged in conversation several times with a Sam Habash, a cabinet maker, in an effort to persuade him to join the union. According to Haggith, he was engaged in such a conversation on Saturday, August 13th. Habash suggested Haggith should ask "Big John" (the shipping foreman) what would happen if a union got in. Big John was then in the area and Habash called him over and asked him to tell Haggith what would happen. Big John, according to Haggith said "if the union got in Jerry (Kernohan) would close the mill down and go cash and carry". Habash admits talking to Haggith three or four times about a union but at first could not recall any discussion with Big John, but in cross-examination agreed that there was such a discussion and Big John said "unions no good here now. Why you need a union". Habash denies any conversation about the plant closing. Having had the opportunity of observing both Habash and Haggith in their testimony, we accept the Haggith version over Habash's.

20. Haggith testified that on August 12th he was approached by Howe, the plant superintendent, regarding his future plans. Haggith stated he was thinking of staying on full-time and not going back to school. Howe said he could use him but that he would have to "clean up his act" (there is no doubt and is freely admitted by Haggith that his attendance and punctuality records were extremely bad). The following day, Saturday, August 13th, Haggith did not arrive at work until 10.00 a.m. and threatened not to continue work after lunch because of a dispute as to whether he should operate a machine with no one else in attendance. Haggith in fact returned to work 15 minutes late from lunch and in the meantime the respondent had fortuitously hired two casual employees to cope with the workload.

21. On the following Monday he was approached by Kernohan around 4.30 p.m. who asked "what the hassle was on Saturday". There was some discussion about that and then Kernohan asked who had told him he could start working full-time. Haggith replied that Howe had okayed it. Kernohan then said "why did you start this union and why are you causing all this trouble". Haggith's response was that "I hadn't started it, I was asked to help start it". Kernohan said "you are through the end of next week and that it isn't because of the union but because of your attitude". Haggith said "fine" and started walking away saying "I wasn't planning to stay with the Company anyway". Kernohan asked "what did you do it for then – spite?". Haggith replied that he could phrase it that way if he liked. Kernohan in his testimony denies saying anything about the union but that it was Haggith who volunteered that he had started the union and not that he was "part of it" to which Kernohan asked why. Kernohan agrees the word "spite" was used but can't recall by which one of them.

22. Paul Ritchie was hired mid-August for the cabinet-making department by Kernohan. Ritchie is a graduate student who had been employed as a social worker but concluded there was no advancement in that field and decided to launch a new career. He was interested in woodwork, having built a few things on his own, drawings for which he took with him to his employment interview. Kernohan told him that the Company had no formal apprenticeship program but he could work with the cabinet makers, which he did for four weeks.

23. Ritchie attended a union meeting on September 1st at which there was a total of five full-time employees and one part-time employee. At noon on September 2nd, Herman Lamers, also working in the cabinet department, told Ritchie that Kernohan had a list of names of people who had attended and that Kernohan had shown the list to Sam Habash, also a cabinet maker. Lamers who subsequently testified stated that he overheard a conversation between Kernohan and Habash in which Kernohan said "there was only five plus one student at the meeting" and Kernohan had a paper in his hand and said he had a list of those there. Kernohan in his testimony first stated that he had never discussed the meeting with Habash but later stated "I was aware how many people were there. I knew Habash was deeply interested and I reported to him as such. Probably I said five full-time and one student – everybody knew it".

24. In respect to the September 1st meeting which Ritchie attended, he testified that another cabinet maker had also intended to attend but who told Ritchie at 5.00 p.m. that he was not going. He stated that Sam Habash was said to have replied "good, because Jerry told him there would be trouble for anyone who did".

25. At the beginning of the following week, Ritchie was told by Howe that they were short in the stockroom and that he would be there for several days. When an expected replacement for the stockroom did not show up on September 12th, Ritchie spoke to Kernohan pointing out that he had been hired to work in cabinet making and if things were slow he would rather be laid off than to work at something he hadn't been hired for. Kernohan, according to Ritchie, stated that "we don't do things that way" and that Ritchie had the choice of working where he was told or quitting. Ritchie testified that another man employed for the cabinet-making department the day after Ritchie, continues to work there and that this man might have more experience. Ritchie has since quit.

26. We have no hesitancy in concluding that the threat made by Kernohan to close the plant if the union were successful was made to Moore and to others. McManus testified that the rumour was widespread in the plant, Taylor testified that he and Fleischauer had discussed it at lunch, Big John made some allusion to it in the discussion between Haggith and Habash. This is a clear violation of sections 56 and 58(c) of the Act. A threat to job security of this type has in the past led to the Board's conclusion that employees who have been subject to such a threat are unlikely to be able to freely express their true wishes in a representation vote. We are satisfied that the true wishes of the employees in this case would not be revealed in a vote. In arriving at this conclusion we have had regard to the employer's threat to job security if the union were successful, to the small size of the bargaining units involved, and to Kernohan's high profile of involvement with the group of employees opposed to the union as late as September 2nd.

27. The Board is further satisfied that the applicant has membership support adequate for the purposes of bargaining collectively in each of the two units found to be appropriate by the Board.

28. Certificates will issue to the applicant.

0566-77-U Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Complainant), v. 332518 Ontario Limited, carrying on business as **International Chinese Restaurant**, (Respondent).

Discharge for Union Activity – S. 79 – Whether employee discharge motivated by anti-union animus – Whether section 62 is a defence to unfair practice allegation.

BEFORE: G. Gail Brent, Vice-Chairman and Board Members F.W. Murray and H. Simon.

APPEARANCES: *H. Goldblatt and Joe Aggimenti for the applicant; Hart M. Rossman, Frederick Kan and Simmy Lui for the respondent.*

DECISION OF THE BOARD: October 27, 1977.

1. The name "International Chinese Restaurant" appearing in the style of cause of this complaint as the name of the respondent is amended to read: "332518 Ontario Limited, carrying on business as International Chinese Restaurant."

2. The complainant in this matter has complained that the grievor, Sing Chan, has been dealt with by the respondent contrary to the provisions of section 56, 58 and 61 of the Labour Relations Act and requests that the grievor be reinstated with full back pay and no loss of seniority or any other benefits.

3. The grievor was employed by the respondent as a waiter from November, 1976 until his discharge on July 1, 1977. The grievor was notified of his discharge by letter dated June 30, 1977 (Exhibit #4) under the letterhead of the International Chinese Restaurant and signed by Miss Lui for "The Management." The letter reads as follows:

"It has come to our attention that you have been putting pressure on other members of the staff inside our restaurant in the past few weeks and that your conduct has been a disrupting influence. Your conduct may, or may not have something to do with the certification application before the Ontario Labour Relations Board.

Nevertheless, while at work, employees are expected to devote their full time and energy to their jobs, our patrons are entitled to quick and courteous service.

Because of your conduct, regrettably, it is necessary to dispense with your services. Accordingly, you are hereby *dismissed* forthwith for cause. You may pick up your pay and separation notice in the office."

4. In the reply to the complaint the respondent stated, *inter alia*,

"... Mr. Chan was dismissed for activities not condoned by section 62 of The Labour Relations Act. In addition to organizing on company premises during working hours, Mr. Chan intimidated at least two employees ..."

5. During the course of the hearing the employer led evidence concerning the grievor's work performance during the period of his employment. The essence of the testimony of Messrs. Kwan and Tang, the manager of the third floor and the personnel manager respectively, was that the grievor was not considered to be a satisfactory employee. The main areas of complaint appeared to be that the grievor was not punctual, that customers had complained about him, that he was often seen in areas of the restaurant where he had no business being talking to other employees. Mr. Kwan testified that he warned the grievor about lateness at the end of January and again at the end of May and that he spoke to him many times about customer complaints. Neither of them spoke to the grievor about talking with the other employees. Both Mr. Kwan and Mr. Tang specifically denied that they were aware of a union organizing campaign involving employees of the restaurant or of the grievor's participation in any such campaign.

6. In support of the allegation that the grievor was often late, the employer produced four time cards which belonged to the grievor. Each time card represented a two week period, but rather than being dated they bore the designations "P-10", "P-11", "P-12", and "P-13." These stand for pay periods 10 through 13. There was some disagreement between Mr. Tang and Miss Chan, the bookkeeper, about the dates of these pay periods; however, if it is material, the evidence of Miss Chan is probably more reliable on this point since she works with the books and payroll records. The time cards were compared to the work schedules for that period and counsel for the employer was able to point out nine instances of lateness in the 48 working days covered by the cards. None of the witnesses was able to say whether the posted schedules were strictly adhered to. Miss Chan testified that employees were given a fifteen minute grace period in that no deductions were made if the employees punched in within fifteen minutes from the start of the shift. If the work schedules correctly represent the situation, the instances of lateness shown on the cards were for 47 minutes, 18 minutes, 9 minutes, 7 minutes, 6 minutes, 4 minutes, 1 minute and 1 minute. These cards are for the period May 16 to July 3, 1977, and most of the lateness occurred during the period May 16 to June 5.

7. Mr. Tang also stated that he saw the grievor on the second floor talking to the staff on many occasions. He stated that whenever the grievor saw him the grievor would presumably return to the third floor. Mr. Tang testified that he never talked to the grievor about these activities, but mentioned it to Mr. Kwan. Mr. Kwan did not mention this conversation and, from his testimony, it would appear that he was not aware of the grievor's alleged activities on the second floor. He did testify that he saw the grievor in the third floor kitchen, a place which he said a waiter would not be found normally. As noted earlier, Mr. Kwan did not talk to the grievor about going into the kitchen. Neither Mr. Kwan nor Mr. Tang received any complaints from the staff about these visits.

8. Both Mr. Kwan and Mr. Tang gave evidence concerning the circumstances under which the decision to dismiss the grievor was made. Mr. Kwan testified that he spoke to Miss Lui, who is apparently the manager of the restaurant, about the grievor's work performance. He said that this conversation took place sometime in May and that he made no recommendation to her about the grievor at that time. On cross-examination Mr. Kwan said that he did not decide about firing employees but reported to his superior, Miss Lui, who makes the decisions to fire. Mr. Kwan also said that he reported about the grievor's work performance sometime at the beginning of June at a monthly meeting of various managers, including Mr. Tang and Miss Lui. Mr. Kwan may or may not have recommended the grievor's discharge at that meeting, but it is clear from his testimony that the decision to discharge was not made at that meeting. It would appear rather that, a couple weeks after the meeting, he was approached by Miss Lui and asked his opinion which apparently was that the grievor should probably be dismissed after so many warnings. Mr. Kwan was quite definite that the decision to discharge was not his and that he did not know the contents of the letter of discharge.

9. Even allowing for the problems which might arise from the translation process, Mr. Tang's account of how the decision to discharge was made differs considerably from that given by Mr. Kwan. He stated that Mr. Kwan, Miss Lui and he met at a regular weekly managers' meeting and discussed the grievor's efficiency, punctuality, and work performance. After this discussion he said that the three of them were in agreement that the grievor should be fired. He was certain that no other matters were discussed and the grievor was discharged because of his failures in the areas discussed. He did not write the letter of discharge which he stated was written by Miss Lui. Mr. Tang could not remember when this meeting took place, but thought that it was around the 20th or 21st of June or perhaps later. Mr. Tang was certain that, at the time of the discussion about the grievor, there was no discussion about the grievor's union activities and that he was not aware of any attempt to organize the employees of the restaurant.

10. It should be noted, though, that on June 20, 1977 the applicant made an application to this Board for certification of the employees of the respondent (Board File No. 0487-77-R) and that the Notice to the Employees (Form 5) was dated on June 21, 1977. Further, on June 28, 1977 the respondent's solicitor wrote to the Registrar of this Board (Exhibit #5) stating, inter alia:

"The enclosed documents indicate that the organization campaign was conducted on the employer's premises during working hours. The provisions of the Act severely limit the employer from making any inquiries of its own. However, it has come to our attention that, as late as yes-

terday afternoon, one Sing Chan, a waiter, was pressuring the kitchen staff to sign the Applicant's membership forms. As well, it has come to our attention that the dishwashing staff were told to sign cards 'for management'".

It will be remembered that the letter of discharge was dated June 30th and given to the grievor on July 1st.

11. The employer also led evidence from some of the employees at the restaurant. Wong Hing Ng, a dishwasher on the third floor, testified that the grievor approached her about going to a meeting about the union. She was unclear about when this request took place, but she did testify that she had had no conversation with the grievor in the past several months and that she had not been threatened by anyone. Hon Keung Siu, a cook in the third floor kitchen, testified that after Form 5 was posted he happened to meet the grievor in a washroom in the restaurant and was asked by the grievor if he knew the contents of the green paper (Form 5). Mr. Hon said he did not and asked the grievor to explain it to him. In the course of this conversation, it would appear that the grievor also asked Mr. Hon if he wished to join the Union. The conversation lasted between five and ten minutes. Shek Leung Lui, a cook in the third floor kitchen, testified that the grievor never spoke to him about joining the Union or going to a meeting, and that no one spoke to him concerning his evidence before this Board. Chu Wan Lit, a cook in the third floor kitchen, testified that after Form 5 was posted he was told by the grievor that there would be a meeting in another restaurant about the Union. Mr. Chu indicated that he was new to the country and did not know the benefit of joining the union or about too many things. He said the grievor said there would be translators for him there because he did not speak English. That was all there was to that conversation. It must have taken two or three minutes at most. At least two of the witnesses reported these conversations to Miss Lui and at least one report was prior to the grievor's discharge.

12. During the course of Wong Hing Ng's testimony, counsel for the respondent asked her whether she had had a conversation with the grievor on a specific date subsequent to the discharge. Counsel for the applicant objected to the question as being irrelevant. Counsel for the respondent was informed of the Board's concern because the event he was seeking to question the witness about took place after the discharge and the Board could not see the relevance of subsequent events to the issue before us, that is, the reasons for the grievor's discharge. Counsel for the respondent then proceeded to intimate that he had reason to believe that the witness might have been pressured into changing her evidence. He then asked her specifically whether she had talked to the grievor over the past months and whether she had been threatened or intimidated in any way. The witness answered no to both of these questions. Counsel did not attempt to contradict the evidence of this witness with other evidence, or have the witness declared adverse or hostile.

13. During the examination in chief of Hon Keung Siu no questions were asked concerning possible intimidation except possibly a question put to the witness about whether an unidentified person sitting in the hearing room talked to him about his evidence. On cross-examination the witness was asked whether a particular member of management had ever threatened or intimidated him, to which he answered no. On re-examination, counsel for the respondent asked whether anyone in the union had ever threatened or intimidated him. This question was objected to on the grounds that the matter could have been raised during

examination-in-chief and was not covered in cross-examination. This objection was upheld over the protest of counsel for the respondent who conveyed the impression that he had not covered this area because of the Board's ruling about the question he put to Wong Hing Ng.

14. Counsel for the respondent asked the Board to reconsider these rulings, but on the basis of the representations the Board could find no reason to reconsider.

15. The evidence of the grievor was that he had been warned on one occasion concerning lateness but that had been early in his employment. He testified that many of the instances of being 3 minutes or so late probably occurred because he and some of the staff came early to eat lunch before work started and were not allowed to punch in until after they were through changing or eating. He denied being spoken to about customer complaints and confirmed that he had never been spoken to about being on the second floor. He testified that it was often necessary to go to the second floor during the course of his work, and to a certain extent this was supported by the evidence of Mr. Tang.

16. It was acknowledged that the grievor was participating in the union organizing campaign, but he denied signing people up on the employer's premises or pressuring his fellow employees to join the Union. He said that after Form 5 was posted in the restaurant he did speak to people about coming to a meeting after work to discuss the union. He stated that most of his discussions with the others were about what the green notice (Form 5) meant, but emphasized that he did all of his organizing off the premises and outside working hours. There was an allegation that a pad of receipts was found in the restaurant, but no evidence was called concerning the circumstances under which the respondent obtained this pad, and the grievor denied ever bringing it on the premises of the restaurant.

17. By virtue of section 79(4a) of *The Labour Relations Act* the respondent employer bears the burden of proving that it did not act contrary to the Act. Of particular concern is section 58(a) which prohibits an employer from, *inter alia*, discharging an employee "because the person was or is a member of a trade union or was or is exercising any other rights under this Act."

18. With respect to the evidence placed before us it would seem reasonable to find, on balance, that the prime, if not the only, reason for the grievor's discharge was that he was known to be active in the campaign to organize the respondent's employees. Despite the assertions of Messrs. Kwan and Tang that they were unaware of any attempts to organize the employees before the grievor's discharge, the respondent's solicitor referred to the grievor in a letter to the Registrar of the Board at the end of June and the discharge letter itself refers only to the grievor's activities among the staff. The other matters such as punctuality, customer complaints, and performance of his duties, which were stressed by Messrs. Kwan and Tang as being the reasons for discharge, are not even mentioned in the letter of discharge. The person who either made the decision to discharge or, at the very least participated in the decision, and wrote the letter, Miss Lui, was not called to testify for the employer even though she was present throughout the hearing. In view of the discrepancies between Mr. Kwan and Mr. Tang and their lack of knowledge of which grounds were set out in the letter, it would seem only reasonable to expect the senior manager, Miss Lui, to be called to give evidence. The Board agrees with counsel for the applicant that under the circumstances an adverse inference should be drawn against the respondent and that the Board is entitled to infer that Miss Lui was not called because her evidence would have been unfavourable (So-

pinka and Lederman, The Law of Evidence in Civil Cases, pages 535-537). It must be said, though, that, even without this inference, the evidence indicates that the grievor's shortcomings as a waiter, even though they may exist, played no part in the ultimate decision to discharge him.

19. In reaching this conclusion the Board has considered that the discharge letter is silent on these points and that there is no evidence of any warnings given the grievor, except those concerning his punctuality. It would seem, then, that unless the grievor was engaging in conduct not condoned by section 62 of the Act there is no reasonable finding possible other than the discharge was contrary to the Act.

20. Counsel for both parties cited many cases to us concerning the interpretation of section 62; chief among these were *United Steelworkers of America v. Ralph Milrod Metal Products Ltd.* (1964), 3 CLCC ¶ 16,007; *Delta Steel Fabricating Co. Ltd.*, [1973] OLRB Rep. 406; *Barbara Jarvis and Associated Medical Services Incorporated*, (1961), 4 CLLC ¶ 16,218; and *Retail, Wholesale and Department Store Union v. McNair Products Company Limited*, [1966] OLRB Rep. 518. These cases attempt to explore the extent to which the employer can rely on section 62 as a shield when discharging an employee who has been engaging in certain sorts of union activities while at work. The section in question reads as follows:

“Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.”

21. The cases are unanimous in their view that that section is a shield for the protection of the employer who has been accused of an unfair practice under the Act. In *Delta Steel (supra)* it was said that the section:

“... does not prohibit anyone from attempting to persuade employees at their places of work during their working hours to continue to be members of a trade union. Its purpose is to afford to an employer in certain circumstances an answer to the charge that, by taking disciplinary action against a person who has engaged in the conduct spelled out in the section, he has *ipso facto* contravened the unfair practice sections of the Act...”

It should be noted that the decision said that a defence would be provided in “certain circumstances” rather than all circumstances.

22. The *Ralph Milrod* case (*supra*) really does not explore what those circumstances are or might be but it was apparently determined there that leaving one's work station during working hours to sign up another employee was not the type of activity which could be characterized as the exercise of a right under the Act. The *McNair Products* case (*supra*) may be the most helpful in the present case. There the grievors were active in trying to organize other employees and had prepared a document for the employees to sign in an attempt to gain voluntary recognition. All of the signatures but one were obtained during the lunch break and one was obtained in the plant during working hours when an employee asked one of the grievors to give her the document to sign.

23. In analyzing the situation the Board said at paragraph 18:

"When attempting to determine whether the steps taken by an employer to put an end to persuasion by employees during working hours to cause other employees to become members of a trade union are taken in good faith pursuant to the provisions of section 53 [now section 62] of the Act or are taken primarily to thwart the employees' attempt to join a trade union of their own choice, it is often very revealing to look at the nature of the disciplinary action taken. Quite obviously, a warning to such employees would be sufficient to accomplish the employer's purpose in most cases. A suspension may be necessary in other cases where the warning is ignored or there is real interference with production or plant discipline. In extreme circumstances it may well be that the discharge of employees is the only way to put an end to the practice. Where, however, the extreme remedy is adopted without so much as a prior caution, even in the form of a plant rule to that effect, a doubt is created as to the true intentions of the employer."

It then went on to state, at paragraph 19, that there was:

"no evidence that the activities of the aggrieved persons were causing dissension among employees of the respondent or that there was any real interference with the quality or quantity of production, customer relations, safety regulations, plant rules or any other related factor which the respondent would have been justified in protecting. On the contrary, the respondent's production manager testified that there was nothing unusual about the performance of the aggrieved persons' work on the day in question. By using hearsay evidence as justification for the extreme remedy adopted without any attempt to stop the activity in any other way and by discharging the aggrieved persons without explanation and then attempting to bolster the reasons for the discharge in a manner in which the respondent did at the hearing, it is obvious to the Board that the discharges were intended to put an end to all union activity and not simply persuasion on company premises during working hours."

24. In the instant case there is no evidence of any persuasion of employees by the grievor. Persuade is defined in the Oxford International Dictionary as, "to induce (a person) to believe something; to prevail upon (a person) to do something." That is, persuasion, whether friendly or otherwise, involves the conversion of someone to a particular view which was not held before, and the attempt to persuade would involve, at least the espousal of a position with the accompanying attempt to convert someone to that position. Here the most that can be said is that the grievor told some employees about a meeting to discuss the Union and may have asked one or two employees whether they wanted to join the Union. There would appear to have been no attempt on the part of the grievor to try to induce these people to join the union or to prevail upon them to join.

25. It would seem from the evidence that whatever conversations the grievor had with the witnesses were of short duration, were not disruptive and were not the cause of any

complaints by either customers or employees. Most of the conversations appear to have been precipitated by the posting of Form 5, and it is conceivable that many of the employees would be curious about the form and would be talking about its implications.

26. It would also appear from the evidence that if the respondent was concerned about the grievor's activities, it did absolutely nothing to make the grievor aware of its concern and disapproval. Neither Mr. Kwan nor Mr. Tang spoke to the grievor about his presence in the kitchen or on the second floor even though these were the prime instances of disruption alluded to by them. None of the employees related prolonged encounters which disrupted their work. There was no evidence that the respondent's ability to serve its customers in an acceptable manner was affected by any of these conversations or activities. In short, it would seem that, like the *McNair Products* case, the lack of evidence of any disruption of the respondent's business activities, the lack of any attempts at persuasion by the grievor and the immediate discharge of the grievor without any other attempts to stop the activities which the respondent found offensive would indicate that the real reason for the discharge was to thwart the union organization and the right of the grievor and the other employees to join and participate in the union's lawful activities as protected by section 3 of the Act.

27. For all of the above reasons the Board determines that the grievor, Sing Chan, be reinstated forthwith in the position held by him at the time of his discharge. The grievor should, of course, suffer no loss of compensation, benefits or seniority as a result of the discharge and, upon agreement of the parties, the Board will remain seized of the matter if the parties are unable to agree on these matters.

0487-77-R Between: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C., (Applicant), v. 332518 Ontario Limited, (otherwise known as "International Chinese Restaurant") (Respondent).

Certification – Membership Evidence – Whether allegation that employees do not understand English taints membership evidence or will induce Board to order a vote.

BEFORE: D.H. Kates, Vice-Chairman and Board Members L. Hemsworth and A. Hershkovitz.

APPEARANCES: H. Goldblatt and Joe Aggimenti for the applicant; Hart M. Rossman, S. Poon and Miss S. Lui for the respondent.

DECISION OF THE BOARD: October 6, 1977.

1. This is an application for certification.

2. At the original hearing scheduled for this application on July 4, 1977 the Board dismissed the respondent's allegations relating to the applicant's membership evidence, purportedly because of the failure of a large number of members of the bargaining unit to un-

derstand the English language. It was clear to the Board that counsel for the respondent did not allege that the membership cards were fraudulently obtained or otherwise tainted for being irregularly secured. The Board at that hearing indicated that, in the absence of any allegations of an irregularity that would cast doubt on the evidence of membership, other than innuendo and surmise, we would not look behind the signatures purporting to represent the true wishes of the applicants for membership in the applicant trade union. In this regard, of the approximately one hundred and forty-five (145) members that constituted the bargaining unit found appropriate for collective bargaining, not one employee had seen fit to file an objection with respect to representation by the applicant trade union. In brief, the Board does not intend to permit a party to our proceedings to conduct "a witchhunt" into the legitimacy of membership evidence, otherwise properly secured, merely because a large number of the bargaining unit do not speak the predominant tongue of the English-speaking community served by this Board.

3. Nevertheless, because a large number of the cards were signed in the Cantonese script, and because the Board staff could not compare the signatures on the cards with the specimen signatures filed by the respondent in reply to the application, the Board appointed a Labour Relations Officer to inquire into the list and composition of the bargaining unit. The investigation conducted by the Labour Relations Officer, with the help of an interpreter, resulted in the confirmation of the eighty-two (82) membership cards filed by the applicant in support of its application for certification. The results of the Labour Relations Officer's inquiry were "informally" communicated to the parties shortly thereafter. From the perspective of the membership count, the applicant trade union was clearly in a certifiable position.

4. Subsequently, counsel for the respondent employer complained that his client had not been conferred an opportunity to adduce evidence in support of the balance of the allegations filed in reply to the application. That is to say, it still remained for the Board to deal with the respondent's allegations of "pressure" and intimidation exerted upon employees allegedly inducing them to sign cards. The applicant trade union argued that the Board ought not to schedule another hearing in that full opportunity was, in fact, extended the respondent to adduce evidence relating to all of its charges. In the alternative, the applicant requested particulars of the alleged coercive activities relied upon by the respondent. On September 19, 1977, the Registrar was directed to list the matter for hearing arising out of the parties' written representations.

5. On the eve of the hearing, scheduled for October 4, 1977, counsel for the respondent advised the Board as follows:

"Re OLRB File No. 0487-77-R-Service Employees Union, Local 204 & 332518 Ontario Limited

Further to the correspondence of Messrs. Kan, Mark & Poon of June 28th and July 13th and my own correspondence of July 28th, August 16th and September 30th, I wish to advise the Board that we will not deal with the allegations contained in our Reply or in the letters listed above. Nonetheless, it is our intention to appear and make representations on the evidence presently before the Board, including the Examiner's Report.

This is also to advise you that I am having a copy of this letter delivered directly to the Applicant's solicitors.

Yours sincerely,

(sgd.) Hart Rossman"

6. Indeed, at the hearing counsel for the respondent withdrew all charges relating to the conduct by the applicant of its organizational campaign (save those disposed of by the Board at the initial hearing.) Nevertheless, counsel repeated the concerns of the employer with respect to the propriety of the membership evidence attributable *inter alia* to the failure of many of the members of the bargaining unit to comprehend the English language. Counsel requested the Board, in the exercise of our discretion pursuant to section 7(2) of the Act, to direct a representation vote.

7. The Board in this regard simply cannot be motivated by "suspicions" of a party to our proceedings in dealing with the propriety or otherwise of membership evidence. Allegations must be based on sound particulars, supported by fact. It may very well be that members of the bargaining unit may not comprehend the English language. Nevertheless, it does not follow that an applicant for membership did not comprehend the significance of writing his signature on his membership card. For example, he may have had a bilingual person who acted as collector, or a colleague in the bargaining unit, explain the nature and purpose of the applicant's organizational campaign. This may or may not have been the case in the instant application. But for the Board to be motivated by suspicions on the basis of language alone would cause us to destroy and undermine the efficacy of a trade union's attempts to organize employees. *The Labour Relations Act* protects, at the Board's discretion, the identity of employees who have expressed, by their signatures, a desire to be represented by an applicant trade union. For the Board to conduct a judicial inquiry into the circumstances upon which membership signatures were secured, and without any allegation of wrongdoing, would necessarily entail the disclosure of the identities of persons who signed cards and, thereby, would cause a breach of the trust extended to us by the Legislature (section 100 of the Act.) In short, in absence of any allegation of wrongdoing, there must be a presumption in favour of the validity of the membership cards notwithstanding the particular national origin or mode of expression by the signatory thereto.

8. Counsel's request that the Board exercise its discretion to direct a representation vote is therefore denied.

9. Counsel for the trade union alleges that the respondent, throughout these proceedings, has acted in an abusive manner in exploiting the Board's procedure. It is suggested that the charges filed by the applicant were fabrications designed to delay the proceedings and, thereby, undermine the efficacy of any Board certificate that would inevitably ensue. The trade union charges that the withdrawal by the respondent of its charges, notwithstanding its alleged difficulties in arranging for witnesses to give evidence, on the eve of this hearing is indicative of the abuse that has pervaded these proceedings. Counsel as a result requests that costs of the hearing, scheduled for October 4, 1977, be awarded in favour of the trade union.

10. The Board, in dealing with counsel's submissions, is persuaded that there may

very well be some substance to those charges. And, of course, the Board ought not to countenance with impunity any attempt to frustrate the purposes of *The Labour Relations Act* by untoward abuse of our procedures. Nonetheless, the Board is also convinced that the particular and unique difficulties presented by the circumstances of this case ought also to be taken into consideration in weighing the accuracy of counsel's submissions. In this case we are of the view, if there be any doubt as to the respondent's motives in this case, it ought to be given the benefit of that doubt. The Board therefore denies the applicant's request for costs.

11. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the Act.

12. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in Metropolitan Toronto, save and except managers, persons above the rank of manager and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

13. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five (55) per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on June 28th, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

14. A certificate will issue to the applicant.

2206-76-R United Brotherhood of Carpenters and Joiners of America, Local Union 785, (Applicant), v. Heath Construction Inc., (Respondent).

Certification – Construction Industry – Whether evidence concerning nature of work performed by employee is restricted to work done on date of application – Effect of examiner's rulings.

BEFORE: Rory F. Egan, Alternate Chairman and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: C. A. M. Hillmer, Philip J. Wolfenden and Karl Ball for the applicant; S. C. Bernardo for the respondent.

DECISION OF THE BOARD: October 13, 1977.

1. This is an application for certification in which a Labour Relations Officer was appointed by the Board to inquire into and report to the Board on

- (a) the nature of the employment relationship between the respondent and the persons who are affected by this application;

- (b) the nature of the work performed by the persons who are affected by this application on March 31, 1977; and
- (c) the list and composition of the bargaining unit.

2. The date of the application for certification was March 31, 1977.

3. The applicant requested that a hearing be held by the Board for the purpose of hearing representations, *inter alia*, with respect to rulings made by the Labour Relations Officer. The applicant requested the Board to review the rulings and reconsider them in light of the representations to be made by the union. A hearing was scheduled and the Board heard the representations of the parties with respect to the rulings of the Labour Relations Officer.

4. The issues raised during the course of the examination with respect to which the Board heard argument are set out in the Labour Relations Officer's report. It is sufficient, however, to state that the rulings related generally to the question as to whether, in construction industry cases, the evidence adduced with respect to the nature of the work performed by the employees concerned is restricted to that concerning the work done on the date of the application or whether it may be expanded to include evidence relating to work done at times prior to the date of application. In the present case, the period referred to was the month preceding, approximately, the date of application.

5. It does appear that section (b) of the directions given to the Labour Relations Officer in the present case may be capable of a very narrow and restrictive interpretation which, in turn, may have influenced the rulings made during the examination. However, the customary approach of the Board in inquiries such as those which were directed in this case is to be guided by the decision in the *Johnson-Kiewit Subway Corporation* case, [1966] OLRB Rep. June 182 at 183 where the Board said:

In construction industry cases it has been the practice of the Board where employees engage in the work of different crafts (and where they are paid only one rate) to characterize the craft in which they are employed for a majority of their time as the one governing their status on an application for certification. See, for example, *O. J. Gaffney Limited*, O.L.R.B. Monthly Report, August, 1964, p.233; *McNamara Construction of Ontario Limited*, O.L.R.B. Monthly Report, December, 1964, p.419; *Nedan Forming Company Limited*, O.L.R.B. Monthly Report, May, 1965, p.100.

It is clear on examining these and other cases that when the Board speaks of "employed for a majority of their time" reference is being made not to employment on the date of the making of the application but, rather, to a period of time leading up to the date of the application. The cases however do not refer to any fixed period such as two weeks or a month prior to the application. Just how far back the Board will go depends on the particular circumstances of the individual case.

6. As the Board indicated in the case cited above, it is difficult to lay down precise

guidelines with respect to how far back it will go with its inquiries. In the present case, as we have already noted, the attempt to explore the work assignments of one of the employees reached back to "approximately" a month prior to the date of application. The evidence contained in the report is that the employee concerned said that his normal work on March 31st is "sometimes carpenter work and sometimes labour ...". In light of that and other testimony as to his duties on the date of application, it appears to the Board that it would have been helpful to explore his assignments for some time before the date of application in order to assist the Board in determining his occupation or craft on the application date. This exploration would not be confined to the particular employee himself but would extend to any competent witness called by the parties or the Labour Relations Officer.

7. The Board accordingly directs the Labour Relations Officer to continue the examination for the purpose of permitting the applicant to inquire into the work assignments of the employees affected by the application. In the circumstances, and with a view to avoiding further argument on the point, the Board directs that any additional inquiries which the parties may wish to make are confined to the work assignments on the 10 working days preceding March 31, 1977.

8. We would add that there was some question as to the procedure to be followed in the face of a ruling made by the Officer during the course of the examination.

9. Where a party takes objection to a ruling made by an Officer, he must see that his objection is clearly made at the time the matter arises and that it is noted by the Officer. The Officer, having noted the objection, will then proceed with the examination and the Board will deal with the objection. Normally, the Officer, in proceeding, will hear the evidence so that the Board can ultimately rule on its admissibility without the possibility of delay if it is admissible. The Officer, however, does have the authority to exclude that which he is confident is irrelevant so as not to delay proceedings. The Board, in the latter case, may still have to rule upon it and, if it rules it admissible, may have to make arrangements to receive the excluded evidence, but we are confident that such cases will be infrequent and are the cost of ensuring the Officer has sufficient authority to conduct his hearing. In the present case, some doubt exists on the face of the Report as to whether the applicant accepted the ruling or reserved on it. In its letter requesting a hearing, the applicant clearly raised the objection. In view of the unsettled state of the procedure, the Board has dealt with the question raised in the letter.

0883-77-R Nairn Centre Sawmill Workers' Union, (Applicant), v. **E. B. Eddy Forest Products Ltd.** Wood Products Division, (Respondent), v. Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Certification – Trade Union Status – Membership Evidence – Whether irregularities in membership evidence constitute fraud on the Board – Whether Board criteria for status met.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members C. Bourne and O. Hodges.

APPEARANCES: Michael G. Horan, Wilf Peel and Robert Kennedy for the applicant; Francis Donnelly for the respondent; Laurence C. Arnold, Claude Seguin and Fred Miron for the intervener.

DECISION OF THE BOARD: October 27, 1977.

1. This is an application for certification and request for a pre-hearing vote. Another panel of this Board, on September 16, 1977, directed the taking of a pre-hearing representation vote. The Registrar was instructed that following the vote the ballot box be sealed and the matter be further listed for hearing to enquire into the status of the applicant, the applicant's request for certification under section 7a of The Labour Relations Act, and objections made by the intervener to the quality of the evidence filed by the applicant.

2. The representation vote was conducted on September 27, 1977 and the matter was set down for hearing on October 13th and 14th. The applicant, during the course of this hearing, abandoned its request for certification under section 7a of the Act and it, therefore, became unnecessary for the Board to deal with that item. We shall therefore proceed to deal with the remaining matters: additionally, during the processing of this application the Board found some irregularities in evidence of membership filed by the applicant and has conducted its own enquiry therein.

3. Evidence was called to establish the origin and substance of the Nairn Centre Sawmill Workers' Union.

4. On July 25, 1977 a letter had been written to some 190 employees of the respondent in the bargaining unit represented by the intervener union, inviting them to consider the possibility of forming an independent union to displace the incumbent. The letter was written by a Mr. Wilf Peel, a labour relations consultant, resident in Espanola. On August 5, 1977 there was a fortuitous meeting between Peel and a Mr. Robert Kennedy in front of the Espanola Post Office. Kennedy, not having previously met Peel, identified himself as a recipient of Peel's letter and told Peel he wished to talk to him but not in public.

5. Kennedy then telephoned Peel at his home and a meeting between them commenced on August 6th lasting from 3:00 p.m. to 5:45 p.m. Kennedy was interested in knowing more about Peel's background and generally "getting to know him". Peel provided Kennedy with a copy of The Labour Relations Act and also undertook to go through the Act, indexing it in respect to employees' rights and particularly how to form a union. This

indexed copy was delivered to Kennedy August 7th and Peel departed on vacation between August 10th-17th.

6. On August 18th, Kennedy phoned Peel and reported that there was some interest on the job in getting "our own union" and asked Peel if he would call and speak to three other employees, whose names Kennedy gave him. Peel did speak to the three individuals.

7. On August 19th, Kennedy again phoned Peel and said "it looks good. I talked to the guys you talked to and they are interested". That evening Peel ran off 400 copies of a blank application for membership form he had devised preliminary to a meeting to be held at Kennedy's home on Sunday, August 21st. At this meeting, in addition to Peel and Kennedy, there were 3 other employees of the respondent. There followed a discussion of "conditions", Peel showed them the proposed membership form and cautioned the meeting that "this is an information meeting. Be sure you want it and be sure you want to proceed". Arrangements were made for another meeting to be held in two days time and in the interim Peel prepared a draft constitution.

8. At the meeting of August 23rd, starting at 5:30 p.m. in Peel's office, after discussion a motion was approved by the four employees present that it would be appropriate to move forward on the independent union. Following this, the constitution drafted by Peel was presented to the group, who went through it making a number of changes. The constitution as amended was approved and the meeting was adjourned at 7:16 p.m. and the employees present were then signed into membership in the Nairn Centre Sawmill Workers' Union in accordance with the constitution approved. At this juncture Peel impressed on everyone that they must sign on their own behalf: that there could be no borrowed dollars and that the Board was very meticulous in these requirements. It was agreed that Kennedy would act as the prime collector in the forthcoming campaign.

9. A new meeting was then convened with Kennedy in the Chair. The constitution was re-adopted and re-ratified, officers were elected and minutes kept by Peel which were subsequently (after typing) signed by Kennedy as President and Tessier as Secretary-Treasurer. The amended constitution in its final form was typed that weekend. This meeting closed about 8:30 p.m. and shortly thereafter a fifth employee joined the group. These 5 employees developed a letter to their fellow-employees soliciting support and was signed by each of them plus later one more employee. In respect to those signing the letter Peel states that he once more very carefully reviewed the stringent requirements of membership evidence.

10. It was testified that 5 copies of the final constitution were typed. Kennedy and Tessier had copies and at a membership meeting of September 18th the constitution was read. Peel stated that he told Fairburn and the rest that he would prefer that the constitution not be made available to officers of the incumbent union "because they did not indicate they were interested beyond getting information to contest our application".

11. The foregoing evidence was adduced through Peel and corroborated in all important aspects by Kennedy. In addition, Tessier, Secretary-Treasurer of the applicant, who attended the meetings of August 21st and 23rd further corroborated the main testimony in respect to the formation of the applicant and approval of its constitution.

12. The intervener in argument directed the Board's attention to the fact that the constitution document was not put into final typed form until August 26th or August 27th and that memberships purported to have been accepted prior to that time should be considered invalid. The intervener's argument is based on the fact that the initial draft constitution presented to the Board was incomplete by virtue of 3 missing pages, and one cannot be positive that the appropriate pages included in the final document represent what was in fact considered at the meeting of August 23rd. The evidence of Tessier, which we accept, on this point is forthright and clear when he identifies the final typed document as being "the constitution which we wanted". Tessier in response to the question "is that in the form in which it was presented on August 23?" replied "yes". It is the Board's finding that the document filed as Exhibit 3 as the constitution of the applicant came into existence at the meeting of August 23rd and the subsequent reproduction in finished form has no impact on the substantive steps taken by the applicant on that date.

13. The intervener also argued that the applicant organization was intended only as a transitory vehicle until a union could be formed. In support of this contention, attention is directed to a four page letter sent to all employees over Peel's signature and dated August 24, 1977. The letter announces the formation of the applicant union the preceding night, indulges in propagandizing in favour of support for the new organization and contains the following statement,

"Should the Nairn Centre Sawmill Workers' Union members decide, after being certified Peel will provide the following assistance:

- a) set up a Union Steward Group of 15 or 20 and your own constitution (not Tiulio's Constitution Prison)."

It is the intervener's contention that this indicates that what had been done to date was of a temporary character. It is our view that, in the total context of the letter, and of the circumstances out of which emerged the constitution of August 23rd, this statement can only be regarded as demonstrating that the new organization will truly be the creature of its members – and, of course, Article XVI of the constitution provides the procedures for amendments being made.

14. The intervener also suggests that Peel was satisfying his own personal ambitions through fostering the development of this new organization. Even if this were so we fail to see how it has any impact on that which in fact was done.

15. Finally, the intervener argues that since copies of the new constitution were not available in quantity to all employees (there being only 5 copies in existence) and that the requests of two employee officers of the intervener union to see the constitution were refused, that such refusal reflects on the applicant's status credibility as well as demonstrating a coercive discrimination against those not becoming members of the applicant. The applicant's response is that in their view the only purpose for the two requests was in order that the intervener could gain knowledge to be used in contesting the applicant's impending certification application. This Board is not prepared to draw the inferences suggested by the intervener.

16. The Board, based on all the evidence before it, finds that the applicant has dem-

onstrated that the Nairn Centre Sawmill Workers' Union has been properly brought into existence together with a constitution adopted by the member employees, that members have been admitted who ratified the constitution, officers have been elected, and that amongst the objects of the newly-formed union are those of the regulation of relations between employees and employers. The Board is satisfied of the substance and ongoing viability of the applicant union and now finds the applicant to be a trade union within the definition of section 1(1)(n) of The Labour Relations Act.

17. The Board further finds that the present application was filed on a timely basis and that the unit appropriate for collective bargaining consists of:

"All employees of E. B. Eddy Forest Products Ltd. Wood Products Division in its operations in Nairn Township save and except foremen, persons above the rank of foreman, sealers, office staff and security personnel."

Documents filed by the respondent establish that there were employed in the above unit on the appropriate date, 216 employees.

18. We can dispose of one of the intervener's objections to the evidence, namely, that the applications for membership were made prior to the new entity coming into existence. In accordance with our prior finding that the applicant was fully constituted as of August 23rd, the Board is satisfied that none of the evidence of membership preceded this event.

19. In respect to the other objection taken by the intervener, in its reply, relative to applications being solicited and taken by mail this will be dealt with at greater length as will certain irregularities in the evidence which came to light during the Board's own check of the evidence as well as through additional representations made by the intervener and by the applicant itself. These latter irregularities caused the Board to subpoena certain individuals as witnesses in connection with an inquiry launched by the Board into these matters.

20. It is necessary now to review the evidence in respect to the total organizing activities of the application.

21. The Board heard evidence, under subpoena, from Robert Kennedy, President of the applicant and the declarant on the Form 8 declaration filed on behalf of the applicant on September 11, 1977. Additionally, Kennedy had been designated as the co-ordinator of all card collectors: originally it had been intended that there would be 6 collectors (those who had signed the letter of August 24th) but this was subsequently expanded to a total of 10 collectors, including a J. P. Lamothe, around whom the irregularities we are dealing with centered.

22. The evidence was that at the August 23rd meeting, Peel, who was acting as adviser, instructed Kennedy and the other 3 collectors present as to proper procedures in collecting cards. They were told that "each collector was to make sure each guy signed right in front of him and make sure that the dollar was coming from the guy who signed". Peel told them "if someone came along with a form already signed, don't accept it, but have him sign another in front of the collector" and that when Kennedy collected cards from collectors he was again required to ask if this procedure had been followed. Kennedy testified that all collectors were instructed and that he in all cases, on receiving cards, made the outlined enqui-

ries of the collector and in those cases where there were irregularities they were rectified by signing of new cards and/or by additional enquiries.

23. One of the collectors, J. P. Lamothe came up to Kennedy when he was talking with 5 or 6 others and offered to sign a card. Kennedy replied that he had no cards with him and he offered to stop by Lamothe's house that night. Kennedy also said that since Lamothe had 4 or 5 other guys travelling in the same car that Lamothe could sign them up also. On August 26th, Lamothe delivered 5 cards, including his own, to Kennedy. His own card had been signed in all three portions and Kennedy made him complete another card. At this time Lamothe told Kennedy that he had another friend he would sign on Friday. Kennedy went to Lamothe's house accompanied by Tessier on August 29th and picked up the remaining card. Kennedy states he made the required enquiries of Lamothe and received satisfactory answers.

24. On September 14th a meeting was convened between the parties by a Labour Relations Officer in respect to arrangements for the representation vote. At that time Kennedy, Tessier and Peel met separately with the Labour Relations Officer who showed them a card for Louis Phillip Soucy whose name was not on the employer's list and whose signature did not match any signatures submitted. The collector recorded was J. P. Lamothe. The Labour Relations Officer said "we'll be checking these cards again, down at the Board". Peel thought this indicated the officer was apprehensive about other cards and told Kennedy to check with Lamothe what had happened to Soucy's card.

25. Kennedy contacted Lamothe on September 20th which he states was the first opportunity because of working on different shifts. Kennedy states that Lamothe told him that Soucy had forgotten his card at home and because Lamothe was anxious to turn it in, he phoned Soucy who gave permission for Lamothe's wife to sign for him. Kennedy further states that he himself called Soucy and he confirmed Lamothe's story, and that Kennedy once again enquired of Lamothe as to whether the remaining cards were in order and received an affirmative response. Kennedy reported these results to his advisor, Peel, on September 21st.

26. On September 27th, the date of the vote, the Election Officer met privately with Ovila Lamothe and Robert Lamothe and while the Election Officer would not divulge his reason for such meeting on enquiry by the intervener, Peel thought it was evident that it had to do with membership evidence and told Kennedy he had better "get on the horn right away and find out what was going on". As a result, on that day Kennedy spoke to Ovila Lamothe who told him that J. P. Lamothe had signed his name but that he, Ovila, had told the Board representative that it was his own signature: similar enquiries to Robert Lamothe elicited the response that he "couldn't remember".

27. Kennedy then called J. P. Lamothe on September 27th and asked "why". Kennedy reports Lamothe said "I signed for him". Kennedy also testified that Lamothe said "a lot of things but not always the same thing". Lamothe told Kennedy in respect to Ovila, "he don't remember but he sign and he pay his dollar himself". On October 1st, Peel and Kennedy met with J. P. Lamothe and asked about the cards of Ovila and Robert Lamothe. J. P. Lamothe stated that while both had informed the Board representative that they had signed, in fact they had not signed and J. P. Lamothe had signed on their behalf. Peel informed Lamothe that a letter would go to the Board with this revelation and the proposed

letter (which was forwarded to the Board) was read to Lamothe. At this time Lamothe was again asked about the validity of the other cards and he again assured them they were okay and that that was the truth.

28. The letter to the Board reported the results of Kennedy's investigation in respect to the Soucy application and to that of Ovila Lamothe. It did not report the "don't remember" aspect of Robert Lamothe's card nor J. P. Lamothe's additional assurance that despite Robert's lack of remembrance he did indeed sign and indeed paid his dollar.

29. Peel was then absent on vacation from October 2nd-9th and on the evening of the 10th, in a telephone conversation, Kennedy informed him that he had been subpoenaed. Peel told Kennedy that this action probably arose out of their October 1st letter, and to check with J. P. Lamothe to see if he had been subpoenaed. The check was affirmative and Peel instructed Kennedy to get hold of Tessier and Lamothe, which they did that evening, at which time Lamothe again re-assured them that everything was in order. However, on the evening of October 11th, Peel received a call from Lamothe stating that Wayne Laplante had also been subpoenaed. Lamothe said "we talked it over this morning and decided to tell you the whole truth so you won't be surprised on Thursday". Lamothe stated that he had signed on behalf of Robert Lamothe and Wayne Laplante. When questioned as to whether he was sure he hadn't signed on behalf of the fifth guy, he re-assured Peel. On October 12th, by telephone, Peel informed the Registrar that these two signatures were false and that a hard look should be taken at the fifth guy.

30. Two other facts should be noted. Ovila Lamothe, Robert Lamothe, Wayne Laplante and J. P. Lamothe are all closely related. Secondly, at the opening of the hearing on October 13th, counsel for the applicant disclosed the most recent developments as had been reported to the Registrar, and informed the Board that it wished to totally disassociate itself from all evidence filed through J. P. Lamothe.

31. In respect to this evidence there are three questions to be answered by the Board. One, did Kennedy, the Form 8 declarant, at all times exercise due diligence and caution as to the bona fides of the evidence he was putting forward and did he fulfill a continuing obligation to the Board subsequent to the Form 8 filing of making full disclosure to the Board of events which had an important bearing on the weight to be accorded to the membership evidence submitted? In our judgement the steps taken prior to filing Form 8 were more than adequate to ensure that the Board could accept the declaration at face value.

32. Secondly, did Kennedy as the declarant act reasonably expeditiously in ensuring that any knowledge he had as to the bona fides of the evidence filed was brought to the Board's attention? The intervener contends that the Soucy forgery was brought to the applicant's attention by a Board Officer on September 14th and this should have caused the applicant (Kennedy) to have made direct enquiry of all other employees whose cards were collected by the same collector and not to be content with a further enquiry to the collector involved. In view of all the circumstances we are of the opinion that the steps taken by Kennedy to again test the "information and belief" on which he had based his declaration (and which involved one of the two persons directly involved in the evidence) was a reasonable and bona fide action at this stage to ensure that the declarant was not a participant in some fraud on the Board. We think Kennedy could have done no less in fulfilling his obligations to the Board, and in the circumstances was not required to do more.

33. The remaining and even more important question is as to whether it is sufficient that the Board disregard that evidence of membership from which the applicant has now disassociated itself and which was all gathered through this one collector, or whether these specific events cast such suspicion as to the remaining evidence that the Board should not accord any weight to it. Parties appearing before the Board are well aware that the Board views anything which detracts from the general integrity of the membership evidence placed before it as most critical and is quick to deal with any attempt to dissemble. In this instance, we find no scheme or plan to deceive the Board nor do we find that the applicant was careless or negligent in setting in motion procedures which have the potential for producing irregularities in evidence. Rather, based on all the evidence submitted and the standard of care taken, the applicant did everything possible to ensure the integrity of its evidence before the Board, but nonetheless was itself the subject of a deceit perpetrated by the collector, Lamothe. There is nothing in the evidence to suggest that the integrity of the remaining evidence is impugned or that circumstances are such that it would be likely to be impugned. What we have is one totally unreliable and untrustworthy collector amongst 10. It is obvious that the Board would refuse to give any weight to the evidence through this collector even if the applicant had not disassociated itself from it, and the Board so decides. Had the Board found that the standards of care here exercised by the applicant been of a lesser order, it might well have come to a different conclusion in respect to the weight to be accorded to the remaining evidence: in this case the Board accepts such remaining evidence as being in the normal course.

34. There is one remaining element going to the weight to be accorded to the evidence submitted by the applicant. As a result of a mail solicitation, 14 application cards were returned accompanied by one dollar in cash in 11 cases and two cheques and one money order (or two money orders and one cheque, the evidence being uncertain). In respect to the cheques, these have not been cashed and do not, therefore, meet the Board's requirements in order to qualify as evidence of membership support. . .

35. The evidence is, in respect to all applications received by mail, that they were addressed to Peel who passed them unopened to Kennedy who opened them in Peel's presence. Kennedy testified that each envelope contained one dollar and that he signed as the collector. Kennedy further testified that he himself phoned 10 of the mail applicants to confirm that they had signed a card and enclosed the money. Kennedy further testified that in respect to 3 others he got "another guy" to check for him and he reported back that he had checked with the individuals concerned and they reported it was "okay". Peel further testified that he had phoned one such person and the evidence is imperfect as to whether he reported the results of that conversation to Kennedy.

36. The applicant, in submitting its evidence to the Board, did file with the mailed applications the envelopes in which they had been forwarded to Peel. The Board was therefore on notice in respect to this evidence although the face of the Form 8 declaration did not refer to such evidence as being an exception to the general declaration. We are of the opinion, in the circumstances of this case, that the purpose of the Form 8 declaration was served by the filing of the mailed envelopes. We would think, however, it would be a safer and wiser course for an applicant to show on the face of Form 8, information relative to mailed applications in order to provide information to other parties.

37. The Board is also satisfied that the testimony of Kennedy relative to the subse-

quent enquiries made of the applicants for membership to verify their actions entitles such applications to be accorded normal evidentiary weight.

38. The Board will disregard the evidence of membership of one individual checked by Peel, at Kennedy's request, without evidence of the results of that enquiry being reported back to Kennedy. The Board will further disallow two applications for membership accompanied by cheques which, as of the date of the hearing, were uncashed.

39. The applicant had filed with its application 88 applications for membership. As noted above, the Board does not accept as evidence of membership that card by Soucy or any of the four other cards collected through J. P. Lamothe: the Board further declines to accept as evidence the two cards paid by cheque and further finds that the evidence of membership for the one mail applicant checked by Peel must be disregarded. The Board, therefore, is satisfied that, as of the date of application, the applicant demonstrated that it had evidence of membership support of more than thirty-five per cent of those employed in the bargaining unit.

40. The Board, therefore, directs the Registrar to make appropriate arrangements for counting the ballots cast in the representation election of September 27th and to report thereon to the Board.

0131-77-U Labourers' International Union of North America, Local 183, (Complainant), v. Centrac Industries Limited, (Respondent).

Discharge for Union Activity – S. 79 – Whether employees laid off for lack of work or because of their trade union activity.

BEFORE: Rory F. Egan, Alternate Chairman and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: S. B. D. Wahl and I. Petricone for the complainant; D. I. Wakely and Don Law for the respondent.

DECISION OF THE BOARD: October 25, 1977.

1. This is a complaint under section 79 of The Labour Relations Act in which the complainant alleges that Hendrik Bosman, Nicola Cassano, Andrew McClune and Frank Serino (hereinafter called the grievors) were dealt with by the respondent contrary to sections 3, 56, 58(a) and (c), 61 and 63(2) of the Act.

2. The position of the respondent is that the grievors were laid off because of lack of work and not because of any union activities as alleged.

3. The chief witness called by the respondent was Denilo Zampieron, a foreman who has been employed by the respondent for the past 20 years. The respondent manufac-

tures furniture and wood products for hotels and restaurants. He said that every year when there was a lack of work, there had been a layoff. He was asked for company records in this regard but did not produce any. He stated that the choice of who was to be laid off depended sometimes on capability and sometimes on seniority.

4. Zampieron testified that he did not know "money wise" how the production during February compared with other months. He said his assessment of the work load depended upon the orders received. He stated the information was available but he did not have it with him. He also stated that things were slow because there was only a week of work ahead. There was an order in from the Hyatt but it was not in production in April.

5. Zampieron also testified that there had been talk about unions from time to time over the years he had worked for the respondent. He said there was always talk about a union. He also said that the last time he heard it was in September or October or November of the previous year. In any event, it is clear that the subject was not unique in the plant.

6. Zampieron stated that it was his decision to terminate the grievor, Serino, because there was going to be a lack of work. He said that Serino was the last person hired and was not particularly skilled. He said he had hired Serino as a temporary employee as a favour to the latter's uncle who is an employee of the respondent. Zampieron testified that Serino was not terminated because of any involvement with the union. Serino was the last of the grievors to be discharged. We have dealt with him at this time because he, unlike the other grievors, was selected directly for layoff by the witness, Zampieron. His termination was accomplished on April 6, 1977.

7. Serino said that on April 5th he was employed pressing cabinets with another guy who started working with him on that day. The next day he was fired.

8. Serino also said that the grievor, Bosman, had asked him if he wanted to join the union and that he had said that he did not care, but that Bosman took down his name and address. He also stated that Joe Bois asked him about the union and he told him that if enough went in he would join also.

9. The first of the grievors to be discharged was Nicola Cassano. Cassano had been employed by the respondent for some five years and was terminated on April 4, 1977. He was given a letter of that date which was signed by Donald D. Law and reads as follows:

Dear Mr. Cassano:

This is to inform you that your services are being terminated as of April 17, 1977.

Your presence will not be required at this plant from this time forth.

All necessary wages and documents will be forwarded to you within the next five days.

We regret this course of action, but due to lack of work in the department, we have decided to eliminate same.

Yours very truly,

10. Cassano testified that this was the only time throughout his five years of employment that he had been terminated or laid off for lack of work. On other occasions where a lack of work had developed in his area, he had always been moved around from job to job and kept employed. The explanation he got from Joseph Inding who was Zampieron's superior was that the department had been closed. The letter of termination indicates that a decision had been made to "eliminate" the department. Notwithstanding the note of finality contained in the letter, Cassano was called back to work by the respondent on May 3rd. He was asked to report the following day but requested and was granted leave to postpone his return until Monday, May 9, 1977.

11. Zampieron's evidence was that it was not his decision to lay off Cassano but the company's. Initially he testified that Cassano was laid off for lack of work. He later said that Cassano was fired by Mr. Inding. He said that he, Zampieron, had tried to give Cassano a chance to work but the boss had said to lay him off. He then said that he could not say why Inding laid Cassano off.

12. Cassano told the Board that he was unable to understand why the usual practice of moving him around the plant when a work shortage arose had not been followed this time. He testified that there were more jobs also that he could have done.

13. Zampieron also testified that Cassano was not completely satisfactory. He told the Board that he had told Cassano "lots of times" that his production was not up to standard. He was unable, however, to remember any dates on which this occurred. He was unable to say if it had happened within the last year.

14. When asked whether there had been a lack of work during the last five years, Zampieron's reply was that layoff was according to ability. He said that Cassano was not measuring up to par. He did not explain how these deficiencies had not brought a layoff for Cassano in the five previous years. When asked directly if Cassano had been laid off for lack of work, the witness then said he did not know. He said, "I know he left the company. I don't know why". That was immediately followed by the statement "he was terminated on April 4th for lack of work". Inding, who Zampieron said insisted on Cassano's termination, gave no evidence so that the reason for his insistence that Cassano be terminated, rather than accommodated as in the past, remains unexplained to the Board. The evidence given by Zampieron appears to be simply an attempt on his part to supply reasons on Inding's behalf which he hoped would appear credible to the Board.

15. Cassano testified that he was absent on leave because of the death of his mother. He came back to work on December 30th. He said that the foreman asked him if anyone had called him about the union. He said that someone from the union had called the house. He testified that he had had a conversation with the grievor, Bosman, about the complainant union in March of 1977.

16. Evidence was adduced with respect to Cassano's connection with the union. Cassano and Bosman attended a meeting with officers of Local 183 in or about the third week of March 1977. They were told to go back to the plant and get 10 or 15 people they thought they could trust. The two of them went around the plant and got names and addresses of 10 others and Cassano returned with these to the union. Cassano said that they inquired of employees in the plant as to who wanted to join the union. He reported to the union that he

had signed up 15 members. He said he was told to get more but was unable to do so because he was fired. He said that some of the people who signed for the union did not get fired.

17. Bosman was terminated by letter dated April 5, 1977. It is similar to that given to Cassano. The termination is as of April 12, 1977. The final paragraph expresses regret at the course of action and advises that it was necessary because of the ending of current contracts. The second paragraph is in the identical uncompromising language as that used in the Cassano letter. It apparently was meant literally in this case as Bosman remains terminated.

18. The evidence of Zampieron with respect to Bosman's termination was that a week before the termination he had had a discussion with Angelo Sofia, a sub-foreman in the assembly department in which they talked about a layoff since there were too many people and a few should go. Zampieron testified that he did not select which employees were to be laid off but left that choice to Sofia. He said that he did not know why Sofia selected Bosman as an employee to be laid off and that he, Zampieron, played no part in the choice.

19. Angelo Sofia was not called as a witness so that, even if the layoff was necessary, there is no direct evidence before the Board as to why Bosman should have been let go rather than some other employee. Bosman claimed that there was work being done by two people who were both junior to him and less competent at the time he was fired. Zampieron, in reply evidence, stated that he let those junior people stay on, even though they were admittedly less skilled, because he, Zampieron, decided to let them finish the jobs they had started. The difficulty with that explanation is that Zampieron's prior testimony was that the selection of who was to be laid off was not his but the sub-foreman's.

20. Zampieron testified that the grievor, McClune, was selected for layoff by Sofia also. As already noted, Sofia was not called as a witness so that, again, we have no direct evidence as to why McClune was selected for layoff.

21. McClune was hired as a student learner and was, in his words, among the junior employees. He said that he had spoken to Zampieron about taking an apprenticeship course and that it was decided that if he was prepared to go through with it, the company would go along. He got in touch with the proper authorities and had arranged for a meeting. He discussed the apprenticeship with Zampieron on the 5th of April and confirmed with him that a person from the Labour Board was coming down in two days' time. He was dismissed two days before the date set for the meeting. He said that at the time he was laid off he thought that there would be a few more days of work for him. He had not discussed the matter with anyone however, as he was not sure how much work there was or wasn't.

22. As to his union activity, McClune said he was asked by Bosman if he was interested in joining the union. He gave him his name and address and told him he might be able to get more recruits. The only attempt he made at recruiting was to try to get Joe Bois to join. Bois confirmed this and stated in evidence that he told McClune that he was interested in joining the union and gave his name and address.

23. In its relevant statements, the complainant sets out the following in paragraph 7(c). It was the contention of the respondent that since the remainder of the complainant's statement was confined to setting out the dates of the respective terminations by the fore-

man, Zampieron, and the sections of the Act allegedly violated, that the complainant's case must stand or fall upon the particulars set out in paragraph 7(c).

24. Paragraph 7(c) reads as follows:

On or about April 5, 1977, Mr. Denilo, the shop foreman, asked Mr. Joe Bois "had he signed?" Mr. Bois replied that Andrew McClune had asked him if he was interested in the union. Denilo, the shop foreman, then asked "who is the head of it all?" Mr. Bois replied that he did not know. Denilo, the shop foreman, then asked him "to look around and see who else signed".

25. The paragraph was read to Zampieron at the hearing. He testified initially that the discussion took place a couple of days after the termination of McClune and Bosman. Later he said that it occurred three days after termination. He said that a discussion started with Bois when the latter said to him that he did not want to get fired like the rest of the people and that he mentioned McClune and Bosman. As the result of these remarks of Bois, Zampieron told him that he had nothing to worry about. He said that he had trained Bois to use the machine he was working on and to keep working at it.

26. Bois was subpoenaed by the company and his evidence was adduced by the company by way of reply.

27. Bois said that he first became aware of the complainant in March of 1977 when McClune asked him if he was interested in joining the union. As already stated, he gave McClune his name, address and telephone number.

28. Bois stated that he was almost positive that the conversation with Zampieron was one day "after those guys were let go". He asked Zampieron if he was going to be fired also "because his name was on the list of union members that he understood Cassano had given the company" and was given the assurance by Zampieron set out above. Bois said that Zampieron told him he had nothing to fear, that he was glad Bois had approached him and told him that he had joined the union. Bois further testified that Zampieron then told him to keep his eyes open. He repeated that although he could not remember the date, he was positive the conversation took place after the 5th of April. He also testified that Zampieron had made no mention of a list. Zampieron's testimony was that, until the conversation with Bois, he had heard no mention of Bosman and McClune and the union. He testified also that until then he had not heard about the campaign of Local 183. Zampieron also denied that he had told Bois to keep his eyes open.

29. The company also called Basdeo Dipchand, a machine operator with 5 years' service, with respect to the discussion between Zampieron and Bois. This witness testified that the conversation took place after the layoff of Bosman and McClune. Bois had testified that Dipchand had come along during the course of the conversation. Dipchand said he was there when the conversation began. He said that Zampieron did not tell Bois to keep his eyes open. He testified that Bois said that Andy and Bosman got fired and asked Zampieron if he was the next to go and was it because of the union. He said that Zampieron said "What union?" Bois, according to the witness, said "Well, you know, I am in the union". Dipchand said that Zampieron replied, "As long as you have work, just go and do your job - you got nothing to worry about".

30. We are satisfied on the evidence in that regard that the conversation took place after the termination of Bosman and McClune. It is to be observed that the respondent and not the complainant led the evidence relative to the above matter, notwithstanding the fact that it was raised by the complainant in its complaint.

31. As the Board stated in the *Barrie Examiner* case [1975] OLRB Rep. Oct. 745, the respondent, in cases where section 79(4a) is applicable, as it is here, is required to establish two fundamental facts: "first, that the reasons given for the discharge are the only reasons and second, that these reasons are not tainted by any anti-union motives". The evidence in the present case must be reviewed in light of that requirement.

32. The respondent's evidence was directed toward establishing that the termination of the grievors was not based upon union activity, knowledge of which it denied, but was due solely to a lack of work in the plant. There is evidence that there was a lack of work and that a number of employees other than the grievors were laid off, but there remains a question as to why the grievors were selected to be laid off rather than others.

33. In the case of Cassano, there can be no doubt that the department in which he was normally employed had run out of work. However, the evidence is clear that whenever this had happened before, he had been moved elsewhere. This was admitted by Zampieron. However, this time the pattern of five years was altered and no explanation was forthcoming as to why this happened. In addition, evidence of the foreman, Zampieron, was that he did not know why Inding insisted that Cassano must go. It is obvious that Inding is the person responsible for Cassano's termination, yet he was not called to explain why it was necessary to break the five-year pattern.

34. It might also have been of assistance to the Board to have heard evidence from Donald D. Law who signed the letter of April 4th with its statement: "Your presence will not be required at this plant from this time forth". That, coupled with the statement that the company were "eliminating" rather than simply closing down the department is more the language of discharge than layoff.

35. It appears to us that Cassano's coincidental union activity, coupled with the failure of the respondent to produce the witness who insisted on his layoff contrary to the pattern, can lead to no other inference but that the termination or, as it subsequently became, the layoff, was tainted with anti-union motive.

36. In the case of Bosman, the evidence establishes that he was engaged in the organizational campaign at the time he was terminated. Again, no evidence was given by the person who selected him from among other employees for termination. There was no suggestion that Sofia was unavailable and the failure to call a material witness, as he is, must lead to inferences adverse to the respondent's case.

37. The same consideration applies in the case of McClune. It is true that his involvement with the union was not as extensive as that of Cassano and Bosman but he was a member and had made some attempt at recruiting. It may very well be that Zampieron had no knowledge of this, but there again remains the fact that the person who selected McClune for layoff was not called as a witness. Thus, there is left unresolved the question, as it does with Bosman, as to whether his union sympathies formed any part of the reasons for his selection for layoff.

38. As we have already observed, the case of Serino differs from that of the others in that he is the only one who was selected for layoff by Zampieron. Serino's views with respect to the union were non-committed or, at the most, ambivalent and not in any way conspicuous. He apparently would float with the tide. Even if we accept Bois' version of his conversation with Zampieron – a version which indicates Zampieron's concern about who was in the union – there is nothing in the evidence from which the inference could be drawn that Bois betrayed anything he may have known about Serino's position, vague as it was, to Zampieron or anyone else.

39. In the result then, we find that Cassano was dealt with by the respondent contrary to sections 58(a) and (c) of The Labour Relations Act and that he be compensated for all wages lost between the date of his termination and the date upon which he was recalled by the respondent, but not for the period which elapsed between the date of recall and the date upon which he actually returned to work.

40. With respect to Bosman and McClune, we find that the respondent has failed to discharge the onus placed upon it under section 79(4a) of the Act, and we accordingly find that each of them has been dealt with by the respondent contrary to the provisions of sections 58(a) and (c) of the Act.

41. The Board therefore directs that Bosman and McClune be forthwith reinstated in employment with full compensation for all wages lost by reason of their termination.

42. Insofar as Serino is concerned, the Board finds that the respondent terminated Serino because of lack of work and without reference to any connection he may have had with respect to the union.

2173-76-R Graduate Assistants Association, (Applicant), v. The Board of Governors of Ryerson Polytechnical Institute, (Respondent).

Certification – Bargaining Unit – Whether part-time evening instructors should be included in a unit with part-time and seasonal instructors who teach during the day.

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and H. Simon.

APPEARANCES: James Hayes, Ilene Crawford and Ron Myhr for the applicant; Graham D. Worley and John Rolian for the respondent.

DECISION OF THE BOARD; October 17, 1977.

1. In this application for certification the Board is called upon to decide whether part-time instructors in the Division of Evening Studies of Ryerson Polytechnical Institute should be included in a bargaining unit composed of sessional instructors and part-time instructors employed in the regular day-time programme of the university.

2. By its Order dated April 21, 1977, the Board directed the taking of a pre-hearing representation vote in the following voting constituency:

All part time and sessional instructors in the employ of the respondent in Metropolitan Toronto save and except those employees represented by the Ryerson Faculty Association and those instructors engaged in the Division of Evening Studies, the Division of External Programmes and the open college of the Respondent.

3. The applicant union and the university are agreed that the proposed bargaining unit should not include full-time professors presently engaged on permanent contracts. They are represented for collective bargaining purposes by the Ryerson Faculty Association and are subject to a collective agreement between that Association and the Institute. The parties are further agreed that instructors in the Division of External Programmes and in the "open college" associated with Ryerson are to be excluded from the bargaining unit.

4. The only disagreement concerns instructors engaged in the Division of Evening Studies. There are some 140 part-time instructors and 66 sessional instructors employed by day and some 139 part-time instructors employed in evening studies. The position of the applicant is that the instructors who are employed solely in the evening studies programme do not have a sufficient community of interest to be part of a bargaining unit that would include part-time and sessional instructors employed by day. The employer takes a contrary view.

5. By the means of an examination conducted by a Labour Relations Officer the Board has before it considerable evidence as to the duties and responsibilities of the instructors in both the day-time and evening programmes of the Institute. The evidence establishes that there are substantial differences between sessional and part-time instructors who teach by day and part-time instructors who teach in the evening. Those differences go both to the nature and extent of their duties.

6. Sessional instructors teach from 12 to 18 hours of "stand-up time" per week on a day-time basis. That is to say they spend those hours in actual classroom teaching. The average sessional instructor at Ryerson teaches 16 hours per week. The average stand-up time for full-time faculty members is 16.2 hours per week. From the standpoint of teaching, therefore, the sessional instructors have little to distinguish them from the full-time faculty.

7. The same is true insofar as their work outside of the lecture hall or seminar room is concerned. Although they are employed on a term contract for the academic year only, it is not unusual for sessional instructors to use the summer vacation period to prepare courses for the upcoming year or to participate in curriculum planning or other activities of the Institute. During the academic year the sessional instructors participate fully in the work of their departmental committees. They have offices on campus and will devote the same hours as permanent faculty members to consulting with students, marking papers and preparing upcoming classes.

8. The evidence establishes that the educational background of sessional instructors and their career aspirations are the same as would be found among permanent faculty members. Typically they have completed or are in the process of completing a graduate de-

gree in their academic field and they hope to make a permanent career of full-time university teaching. In fact it is not uncommon for Ryerson to recruit probationary full-time faculty members from among its sessional instructors.

9. On the basis of the evidence before the Board, the only difference between sessional instructors and part-time instructors employed by day is in the number of hours they spend in teaching. Part-time instructors teach an average of 6.1 hours of stand-up time per week and they may teach as much as 11 hours a week. They are employed on a contract that is effective for the academic year and stipulates their hours of classroom teaching. By the terms of their contract they are expected to meet with students outside of the classroom and correct and grade their work. They have full responsibility for the preparation and content of their courses. And while their written contract indicates that they may be invited to departmental meetings, the only evidence before the Board is that in practice they are not only invited to attend but expected to do so, and that in fact they do attend as full participants. They have offices on campus and, like sessional instructors or full-time faculty, they spend a substantial number of hours meeting informally with students, marking student's assignments and examinations and preparing their courses.

10. Typically, part-time instructors who teach by day do not hold full-time employment outside Ryerson although they may have part-time jobs elsewhere. Their educational qualifications and career aspirations appear to be identical to those of sessional instructors; they see themselves as academics and educators primarily and look forward to eventually holding a position as a sessional instructor or a permanent full-time faculty member.

11. Part-time instructors in the Evening Studies Programme are a different breed. Apart from some 6 or 7 persons who are also employed as part-time instructors by day or sessional instructors by day and a greater number who are members of the full-time faculty at Ryerson who do extra teaching at night on a contract basis, the part-time instructors in the evening studies are not, as a general rule, professional academics. For the most part they are professionals or businessmen who make use of their expertise in their field to give an evening course. While they may do so for the enjoyment of teaching or for the remuneration involved, they do not normally teach with any view to advancing to a full-time academic career. On the average they teach a little over half as many hours per week as part-time instructors employed in the day-time. More importantly, they do not have offices on campus and consequently do not devote as much time to consulting and meeting with students individually as do sessional and part-time instructors in the day-time programme. They have little, if any, contact with their day-time colleagues: as a general rule they do not participate in departmental meetings and, apart from their own courses, have little or no input into curriculum development. On the basis of the evidence before the Board they appear to have a minimum degree of integration in the Institute and have a substantially lower degree of commitment to teaching as a principal means of livelihood than sessional and part-time day instructors. Academic work is the primary occupation of sessional instructors and part-time day instructors. It is at most a secondary interest for part-time instructors employed in the Evening Studies Division.

12. The issue is whether there is a community of interest between day-time and evening instructors as regards their employment relations. The factors that the Board considers respecting that question are:

- (1) The nature of the work performed.

- (2) The conditions of employment.
- (3) The skills of employees.
- (4) Administration.
- (5) Geographic circumstances.
- (6) Functional coherence and inter-dependence.

(see: *Usarco Limited* [1976] OLRB Rep. Sept. 526).

13. In this case there are differences in the nature of the work performed by day-time and evening instructors, as well as in their conditions of employment. While their skills may be the same insofar as classroom teaching is concerned, the nature and extent of their duties is markedly different as regards work that must be performed outside the classroom. The evidence establishes that day-time instructors, whether sessional or part-time, spend a considerable amount of time on campus outside of teaching hours. They keep office hours, consult with students and participate in departmental meetings on such an ongoing basis that they are often indistinguishable from probationary or full-time faculty members. None of those duties are performed on any substantial basis by persons employed solely as part-time instructors in the Division of Evening Studies.

14. The evidence before the Board suggests that the day-time and part-time evening instructors move in different worlds with little functional coherence and inter-dependence to bind them. Moreover, while both groups do work under a common administration, the part-time evening instructors are separately accountable to the Dean of Evening Studies. In fact, setting aside the yardstick of community of interest in the labour relations sense, these two groups appear to share little, if any, active collegiality in the traditional university sense.

15. Having regard to all of the above we are satisfied that the part-time evening instructors at Ryerson do not share a sufficient community of interest in matters of employment relations with sessional instructors and part-time instructors employed by day so as to be included in the same bargaining unit. As compared to day-time instructors they have a separate and different stake in the content and outcome of collective bargaining with the Institute.

16. The Board recognizes that there may be some marginal disutility whenever it opts for a less than comprehensive bargaining structure. In this case, however, that disutility is outweighed by the value of fashioning a bargaining unit that will protect the needs of day-time employees whose vital job interests and commitment to the Institute and its endeavours are different from those of the part-time evening instructors. Moreover, we are satisfied that the separation of these groups for collective bargaining purposes will not seriously hamper the Institute in the negotiation and administration of collective agreements.

17. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

18. The Board further finds that all part-time and sessional instructors in the employ

of the respondent in Metropolitan Toronto, save and except those employees represented by the Ryerson Faculty Association and those instructors engaged in the Division of Evening Studies, the Division of External Programmes and the open college of the respondent, constitute a unit of employees of the respondent appropriate for collective bargaining.

19. The Board is satisfied that not less than thirty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 5, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

20. On the taking of the pre-hearing representation vote directed by the Board more than fifty per cent of the ballots cast were cast in favour of the applicant.

21. A certificate will issue to the applicant.

22. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING SEPTEMBER 1977

BARGAINING AGENTS CERTIFIED DURING SEPTEMBER

No Vote Conducted

1104-76-R: International Association of Machinists and Aerospace Workers (Applicant) v. Stratoflex of Canada Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in the unit).

1374-76-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Indusmin Limited (Respondent).

Unit: "all employees engaged as drivers working at or out of the respondent's Halton Quarry, Milton, Ontario, save and except dispatcher, persons above the rank of dispatcher, office staff and persons represented by subsisting collective agreements." (30 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. September*).

0001-77-R: Ontario Public Service Employees Union (Applicant) v. Ongwanada Hospital – L.S. Penrose Centre (Respondent) v. Canadian Union of Public Employees (Intervener).

Unit: "all employees of the Ongwanada Hospital, Penrose Division of Kingston, save and except supervisors, persons above the rank of supervisor, and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (123 employees in the unit). (*Having regard to the agreement of the parties*).

0134-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Den-Lee Developments Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0661-77-R: The Canadian Union of Public Employees (Applicant) v. Durham Region Roman Catholic Separate School Board (Respondent).

Unit: "all office and clerical employees of the respondent in the Region of Durham, save and except Supervisor and persons above the rank of Supervisor." (32 employees in the unit). (*Having regard to the agreement of the parties*).

0728-77-R: Association of Commercial and Technical Employees C.L.C. Local 1704 (Applicant) v. Toronto Jewish Congress, United Jewish Welfare Fund of Metropolitan Toronto, United Jewish Appeal of Metropolitan Toronto and Jewish Congress – Central Region (Respondent).

Unit: “all persons employed by the respondent save and except Executive Director, Associate Directors of the Toronto Jewish Congress, Office Manager, Secretary to the Executive Director, Public Relations Director, Director of Data Processing, Comptroller, Budget Director, Director of Orthodox Division, Building Superintendent and persons covered by an existing Collective Agreement.” (23 employees in the unit). (*Having regard to the agreement of the parties*).

0732-77-R: Hotels, Clubs, Restaurants, Taverns Employees Union Local 261, 77 Metcalfe Street, Suite 511, Ottawa, Ontario (Applicant) v. Holitel Limited (Respondent).

Unit: “all employees of the respondent at Hawkesbury, save and except department heads, persons above the rank of department head, security personnel, office secretaries, persons regularly employed for 24 hours per week or less and students employed during the summer school vacation period.” (29 employees in the unit). (*Having regard to the agreement of the parties*).

0733-77-R: Hotels, Clubs, Restaurants, Taverns Employees Union Local 261, 77 Metcalfe Street, Suite 511, Ottawa, Ontario (Applicant) v. Holitel Limited (Respondent).

Unit: “all employees of the respondent at Hawkesbury employed for twenty four (24) hours per week or less and students employed during the school vacation period.” (16 employees in the unit). (*Having regard to the agreement of the parties*).

0761-77-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. David L. Coatsworth Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit). (*Having regard to the agreement of the parties*).

0763-77-R: United Steelworkers of America (Applicant) v. Glengarry Industries (Respondent).

Unit: “all employees of the respondent Company at Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week.” (51 employees in the unit). (*Having regard to the agreement of the parties*).

0767-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Goryn Construction Co. Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, engaged in the operation of cranes, shovels, bulldozers, and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (employees in the unit).

0775-77-R: Sheet Metal Workers International Association Local Union 540 (Applicant) v. Industrial Process Control (Respondent).

Unit: "all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (4 employees in the unit).

0778-77-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lenford Construction Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except persons above the rank of non-working foremen." (18 employees in the unit). (*Having regard to the agreement of the parties*).

0787-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Chicago Vitreous (Canada) Limited (Respondent).

Unit: "all employees of the Company at its Ingersoll plant, save and except foremen, those above the rank of foreman, laboratory staff, office and sales staff, students employed during the summer vacation period, and casual employees engaged solely in the unloading of rail cars." (14 employees in the unit). (*Having regard to the agreement of the parties*).

0799-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. East Side Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*Having regard to the foregoing*).

0801-77-R: United Steelworkers of America (Applicant) v. Crown Cork & Seal Company Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the Respondent Company at Concord, Ontario save and except supervisor, persons above the rank of supervisor, secretary to the President, secretary to the Industrial Relations Manager, secretary to the Chief Financial Officer, secretary to the Controller, Benefits Clerk, Account Coordinator, Assistant Accounting Supervisor, Assistant Paymaster, Engineering Department, Sales and Field Staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (53 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1977) OLRB Rep. September).

0809-77-R: Teamsters Local Union No. 419 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. W. G. McMahon Limited (Respondent).

Unit: "all employees of the respondent working at Mississauga, Ontario, save and except supervisors and those above the rank of supervisors and office and sales staff." (8 employees in the unit). (*Having regard to the agreement of the parties*).

0817-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. Goldist Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0830-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Emperors Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (20 employees in the unit).

0833-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Steeple Jack Services (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0839-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Holscot Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0854-77-R: Service Employees Union Local 268, Affiliated with the SEIU A.F. of L., C.I.O., C.L.C. (Applicant) v. The Atikokan Board of Education (Respondent).

Unit: "all office and clerical employees of The Atikokan Board of Education at Atikokan, Ontario save and except supervisors, foremen, persons above the rank of supervisor or foreman, confidential secretary to the Director of Education and Secretary of the Board, confidential secretary to the Business Administrator and Treasurer of the Board, librarian, attendance counsellor, psychologist, audio-visual technicians, students employed during school vacation periods or on a cooperative work-study programme, persons temporarily under Provincially or Federally funded winter works programmes, persons regularly employed for not more than twenty-four hours per week, persons covered by any subsisting collective agreement." (11 employees in the unit). (*Having regard to the agreement of the parties*).

0860-77-R: International Union United Plant Guard Workers of America Local 1962 (Applicant) v. Trizec Equities Limited (Respondent).

Unit: "all security guards employed by the respondent at Yorkdale Shopping Centre in the Borough of North York, Municipality of Metropolitan Toronto, save and except security chief, persons above that rank, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (3 employees in the unit). (*Having regard to the agreement of the parties*).

0867-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. Holscot Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit.)

0881-77-R: Labourers' International Union of North America, Local # 1059 (Applicant) v. Markus Builders Supply (Canada) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at 1015 Hargrave Road, London, Ontario, save and except non-working foremen, supervisors, persons above the rank of non-working foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (10 employees in the unit).

0886-77-R: Service Employees Union, Local 478 (Applicant) v. St. Joseph's General Hospital (Respondent).

Unit: "all lay employees of St. Joseph's General Hospital, North Bay, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses, graduate and student dietitians, graduate and undergraduate pharmacists, technical personnel, office and clerical staff and persons covered by subsisting collective agreements." (50 employees in the unit). (*Having regard to the agreement of the parties*).

0887-77-R: Local Union 636 International Brotherhood of Electrical Workers A.F.L.-C.I.O.-C.L.C. (Applicant) v. The Penetanguishene Water and Light Commission (Respondent).

Unit: "all employees of the respondent, save and except the foreman, persons above the rank of foreman, the office clerk, students employed during the school vacation period, and persons regularly employed not more than 24 hours per week." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0899-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Daros Construction Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, employed on building projects, except residential building projects, but including labourers employed as helpers of bricklayers and plasterers, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0900-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. 312024 Ontario Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 1825 Finch Avenue West in the Borough of North York, in the Municipality of Metropolitan Toronto, save and except supervisors, property managers, office and clerical staff and persons above the rank of supervisor or property manager." (2 employees in the unit). (*Having regard to the agreement of the parties*).

0906-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Witco Chemical Canada Limited, Kendall Refining Division (Respondent).

Unit: "all employees of the respondent employed at 2 Bradpenn Road, Etobicoke, Ontario, save and except supervisory, office, sales and clerical staff." (6 employees in the unit).

0907-77-R: The Carpenters' District Council of Toronto and vicinity on behalf of Locals 27, 666, 681, 1133, 1963, 1304, 2480, 2482, 1747, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rule Bilt Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all lands north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0909-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Andron Agencies Limited (Respondent).

Unit: "all employees of the respondent working at or out of Hamilton, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

0919-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Traugott Construction Limited General Contractors (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

0928-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Tomary Enterprises Limited (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0943-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Titan Proform Company Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (105 employees in the unit).

0944-77-R: Service Employees Union, Local No. 204, affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Woodstock Nursing Homes Limited (Respondent).

Unit: "all registered nurses, graduate nurses and undergraduate nurses employed by the respondent for not more than twenty-four (24) hours per week at its Dundurn Hall Nursing Home, in Collingwood, Ontario, save and except supervisors, and persons above the rank of supervisor." (2 employees in the unit).

0945-77-R: Office and Professional Employees International Union, Local 343, AFL-CIO-CLC (Applicant) v. Graphic Arts International Union, Local 12-L (Respondent).

Unit: "all office employees of the respondent in Metropolitan Toronto, save and except supervisor and persons above the rank of supervisor." (6 employees in the unit).

0973-77-R: Christian Labour Association of Canada (Applicant) v. Maple Engineering & Construction Company Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing*).

0978-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Direzione Lavori of Canada Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent on residential construction in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Essex and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0154-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Roadwin Contracting Limited (Respondent) v. Local 598 of the Operative Plasterers' and Cement Masons' International Association of The United States and Canada (Intervener #1) v. General Contractors' Section of The Toronto Construction Association (Intervener #2).

Unit: "all journeymen waterproofers, apprentice waterproofers, improvers and journeymen trainees in the employ of the respondent engaged in waterproofing and/or restoration work in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	0

0569-77-R: Canadian Paperworkers Union (Applicant) v. Kimberly-Clark of Canada Limited (Respondent) v. International Chemical Workers' Union, Local 813 (Intervener #1) v. International Chemical Workers' Union (Intervener #2).

Unit: "all employees of Kimberly-Clark of Canada Limited, Borough of Etobicoke, save and except Supervisors, temporary supervisors, persons above the rank of supervisors and office staff." (465 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	464
Number of persons who cast ballots	324
Number of spoiled ballots	3
Number of ballots marked in favour of applicant	224
Number of ballots marked in favour of intervener #1	97

Applications Certified Subsequent to Post-Hearing Vote

1997-76-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicant) v. Smith & Elston Co. Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all plumber, steamfitter, pipe welder, pipe fitter, gas fitter journeymen and apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots marked in favour of applicant	8
Number of ballots marked in favour of intervener	5

2076-76-R: Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 91, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coinamatic (Eastern) Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working in Ottawa save and except foremen, those above the rank of foreman, office and sales staff." (46 employees in the unit).

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	12
Ballots segregated and not counted	2
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2

0641-77-R: Service Employees Union, Local 204, Affiliated with SEIU, A.F. of L.C.I.O., C.L.C. (Applicant) v. Extendicare Ltd. (Respondent).

Unit: "all employees of the respondent at Mississauga, who are regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements." (46 employees in the unit).

Number of names of persons on revised voters' list	45
Number of persons who cast ballots	23
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	2

0650-77-R: The Independent Gas Workers Union (Applicant) v. The Consumers' Gas Company (Respondent) v. Group of Employees (Objectors) v. International Chemical Workers Union and its Local 161 (Intervener #1) v. International Chemical Workers Union and its Local 513 (Intervener #2).

Unit: "all employees of the company who are included within the classifications set forth in Appendix "A" of the Collective Agreement between the Consumers Gas Company and Local 161, International Chemical Workers Union effective from September 8th, 1975 until September 8th, 1977, and who are included in the areas covered by Metropolitan Toronto, West Central, East Central, North Central, Georgian Bay and Brockville (see Map: Reference O.T. 371) save and except executives, superintendents, general foremen, those employees comprising the engineering laboratory and clerical staff, foremen and all other positions of a permanent supervisory or administrative nature." (715 employees in the unit).

Number of names of persons on revised voters' list	674
Number of persons who cast ballots	577
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	519
Number of ballots marked in favour of intervener #1	52

0673-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Lucier Drainage Supplies Ltd. (Respondent).

Unit: "all employees of the respondent working at or out of McGregor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (22 employees in the unit).

Number of names of persons on revised voters' list	21
Number of persons who cast ballots	21
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	7

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0278-77-R: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. K.W.E. Incorporated (Respondent) v. Employee (Objector). (4 employees).

0321-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. InterRoyal Corporation Ltd. (Respondent). (2 employees).

0462-77-R: Ontario Haulers Union (Applicant) v. Repac Construction & Materials Limited (Respondent) v. A Council of Trade Unions Acting as the representative and agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183 (Intervener #1) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 (Intervener #2) v. Labourers' International Union of North America, Local 183 (Intervener #3) v. The Metropolitan Toronto Road Builders' Association (Intervener #4). (15 employees).

0722-77-R: International Brotherhood of Painters and Allied Trades Local Union 557 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Canadian Union of Public Employees, Toronto Civic Employees Union, Local No. 43 (Intervener). (6 employees).

0773-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Campland Developments Ltd. (Respondent). (2 employees).

0779-77-R: Canadian Paperworkers Union (Applicant) v. BASF Canada Ltd. Cornwall Works Division, Cornwall, Ontario (Respondent). (10 employees).

0815-77-R: Office and Professional Employees' International Union, Local 225 (Applicant) v. Supply and Services Union of the Public Service Alliance of Canada (Respondent). (6 employees).

0837-77-R: United Brotherhood of Carpenters and Joiners of America Millworkers, Local 802 (Applicant) v. Conklin Lumber Company Limited (Respondent) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Intervener). (42 employees).

0840-77-R: Amalgamated Meat Cutters and Butcher Workmen of North America AFL CIO CLC (Applicant) v. Avondale Dairies, Division of Beatrice Foods (Ontario) Limited (Respondent). (36 employees).

0844-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Patrick Harrison & Co. Ltd., Harrison Rock and Tunnel Company Limited, Bradford-Harrison & Associates Ltd. (Respondents). (4 employees).

0869-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Majestic Wiley Contractors Limited (Respondent). (14 employees).

0911-77-R: The International Union of Bricklayers & Allied Craftsmen Local #10 Kingston Ont. (Applicant) v. Kilmer Van Nostrand Co. Limited (Respondent). (3 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0192-77-R: Canadian Union of Public Employees (Applicant) v. McMaster University (Respondent).

Voting Constituency: "All employees of the respondent in Hamilton, Ontario, employed as teaching assistants and enrolled at the respondent as graduate or undergraduate students save and except persons covered by subsisting collective agreements between the respondent and Security Guards Association; International Union of Operating Engineers, Local 772; Service Employees' International Union, Local 531 (Food Services); Service Employees' International Union, Local 532 (Machinists). (1116 employees).

Number of names of persons on revised voters' list	990
Number of persons who cast ballots	639
Ballots segregated and not counted	48
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	185
Number of ballots marked against applicant	404

0707-77-R: Ready-Mix Building Supply, Hydro & Construction Drivers Warehousemen and Helpers Local 230, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Graham Bros. Construction Limited (Respondent).

Voting Constituency: "All truck drivers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except foremen and persons above the rank of foreman." (26 employees).

Number of names of persons on revised voters' list	33
Number of persons who cast ballots	32
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	26

Certification Dismissed Subsequent to Post-Hearing Vote

1223-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Bro Industrial Development Corp. Limited (Respondent).

Unit: "all construction labourers engaged in residential construction employed by the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman and labourers engaged in masonry and plastering." (10 employees in the unit).

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	10

1535-76-R: Pharmacists and Professional Employees Association, Local 1976 (Applicant) v. G. Tamblyn Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all licensed pharmacists employed by the respondent at its retail stores in Metropolitan Toronto." (83 employees in the unit).

Number of names of persons on list as originally prepared by employer	63
Number of persons who cast ballots	50
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	16
Number of ballots marked against applicant	34

0679-77-R: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. Crowle Electrical Limited carrying on business as Crown Electric (Respondent) v. Christian Labour Association of Canada (Intervener) v. Group of Employees (Objectors).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (24 employees in the unit).

Number of names of persons on list as originally prepared by employer	24
Number of persons who cast ballots	23
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	10
Number of ballots marked in favour of intervener	11

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0859-77-R: Local Union 785, of the United Brotherhood of Carpenters and Joiners of America, formerly, Grand River Valley District Council, on behalf of Local Unions, 498, 949, 1940, 2173 (Applicant) v. Con-Eng Contractors (1972) Limited (Respondent). (2 employees).

0894-77-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. The IAC Companies (Respondent). (9 employees).

0917-77-R: Teamsters Local 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Flamboro Downs Holdings Ltd. (Respondent). (130 employees).

0955-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Duomax Developments Limited (Respondent). (3 employees).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

0868-77-M: Graphic Arts International Union, Local 35-P (Complainant) v. Southam Murray Printing (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0081-77-R: Malcolm K. Wilson (Applicant) v. Teamsters Local 141 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. N-J Spivak Limited (Intervener). (*Granted*).

Unit: "all employees of N-J Spivak Limited engaged in the Ready Mix Concrete operation at and out of N-J Spivak Limited's premises at R.R. # 1, London, Ontario save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (18 employees in the unit).

Number of names of persons on list as originally prepared by employer	18
Number of persons who cast ballots	16
Ballots segregated and not counted	2
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	12

0437-77-R: Rachel Size (Applicant) v. Retail Wholesale and Department Store Union (Respondent) v. Mandarin Motor Hotel (Intervener). (*Granted*).

Unit: "all employees in the beverage rooms and cocktail lounges of Mandarin Motor Hotel at Sudbury, save and except persons regularly employed for not more than twenty-four (24) hours per week." (2 employees in the unit).

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots marked against respondent	2

0457-77-R: Germaine LaRue (Applicant) v. Retail Wholesale and Department Store Union (Respondent). (*Granted*).

Unit: "all employees in the beverage rooms and cocktail lounges of the employer save and except persons employed for not more than twenty-four (24) hours per week." (4 employees in the unit).

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots marked against respondent	3

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

0820-77-R: International Union, United, Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Hiram Walker and Sons Limited (Respondent). (*Granted*).

0861-77-R: Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Public Utilities Commission of Campbellford (Respondent). (*Granted*).

0862-77-R: Local 636, International Brotherhood of Electrical Workers (Applicant) v. The Bowmanville Public Utilities Commission (Respondent).

- and -

0863-77-R: Local 636, International Brotherhood of Electrical Workers (Applicant) v. The Bowmanville Public Utilities Commission (Respondent). (*Granted*).

0864-77-R: Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Hydro-Electrical Commission of the Town of Port Hope (Respondent). (*Granted*).

0865-77-R: Local 636 International Brotherhood of Electrical Workers (Applicant) v. The Hydro-Electric Commission of the Town of Ajax (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0649-77-U: Holmes Foundry Limited (Applicant) v. The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) Local 456 and Gordon Caudie and The Respondents Listed on Schedule "A" & "B" (Respondents). (*Direction*).

0658-77-U: Great Lakes Forgings 1974 Limited (Applicant) v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W.-C.L.C. (Respondent). (*Withdrawn*).

0659-77-U: Great Lakes Forgings 1974 Limited (Applicant) v. David Bergeron, Rejean Duchense, Emile Evereart, Real Geuvremont, Yvon Lachance, Janis Mierkalns, and Francis Paquette (Respondents). (*Withdrawn*).

0660-77-U: Great Lakes Forgings 1974 Limited (Applicant) v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W.-C.L.C., David Bergeron, Rejean Duchense, Emile Evereart, Real Geuvremont, Yvon Lachance, Janis Mierkalns, and Francis Paquette (Respondents). (*Withdrawn*).

0941-77-U: Labatt's Limited (Metro Toronto Brewery) (Applicant) v. David Aaron, Claude Anderson, David Anderson, George Antczak, Tibor Aracs, William Ash, etc. (all of the employees named in Schedule "A") (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0085-77-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Mr. W. Shoveller (Respondent). (*Dismissed*).

0086-77-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Mr. C. Moser (Respondent). (*Dismissed*).

0087-77-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Kitchener Beverages Ltd. (Respondent). (*Dismissed*).

0573-77-U: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. K.W.E. Incorporated and Frank Tottle (Respondents). (*Dismissed*).

0903-77-U: Ontario English Catholic Teachers' Association, L'Association des Enseignants Franco-Ontariens (Applicants) v. Essex County Roman Catholic Separate School Board (Respondent). (*Withdrawn*).

0959-77-U: Labourers' International Union of North America, Local 1059 (Applicant) v. David L. Coatsworth Construction, David Coatsworth and Gary Kilbourne (Respondents). (*Withdrawn*).

0960-77-U: Labourers' International Union of North America, Local Union 1059 (Applicant) v. Lenford Construction Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0084-77-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Complainant) v. Kitchener Beverages Ltd. (Respondent). (*Dismissed*).

0323-77-U: Reinaldo Santos (Complainant) v. Ed's Warehouse (Respondent). (*Dismissed*).

0476-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. 251628 Holdings Limited trading at Jimmy'z II (Respondent). (*Granted*).

0518-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. 251628 Holdings Limited trading as Jimmy'z II (Respondent). (*Granted*).

0574-77-U: International Brotherhood of Electrical Workers, Local Union 105 (Complainant) v. K.W.E. Incorporated and Frank Tottle (Respondents). (*Dismissed*).

0581-77-U: International Beverage Dispensers and Bartenders Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L., C.I.O., C.L.C. (Complainant) v. The New Gregory House Inc. (Respondent). (*Granted*).

0626-77-U: Michael Elder et al (Complainants) v. International Association of Machinists and Aerospace Workers (Respondent). (*Withdrawn*).

0635-77-U: International Beverage and Dispensers Bartenders Union Local 280, of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L., C.I.O., C.L.C. (Complainant) v. New Gregory House (Respondent). (*Granted*).

0671-77-U: Peter George (Complainant) v. United Steelworkers of America Local 2859 and Babcock & Wilcox Canada Ltd. (Respondents). (*Dismissed*).

0681-77-U: David Brodhagen (Complainant) v. Teamsters Union Local 938 and International Carriers Limited (Respondents). (*Withdrawn*).

0715-77-U: Canadian Union of Public Employees (Complainant) v. Medi Park Lodges, Inc. (former owner and operators of Grove Park Lodge) (Respondent # 1) v. Mr. & Mrs. W. Viveen (present owners and operators of Grove Park Lodge) (Respondent # 2). (*Withdrawn*).

0717-77-U: The Canadian Union of Public Employees (Complainant) v. Medi Park Lodges, Inc. (Grove Park Lodge) (Respondent). (*Withdrawn*).

0738-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Sheridan Management Associates (Respondent). (*Withdrawn*).

0760-77-U: Labourers' International Union of North America, Local 247 (Complainant) v. Beaver Seaway Limited (Respondent). (*Withdrawn*).

0764-77-U: Alexander Miched (Complainant) v. John Wood Limited and UAW Local 124 (Respondents). (*Dismissed*).

0793-77-U: Armin Harris (Complainant) v. Jack McCafferty and International Brotherhood of Teamsters Local 141 (Respondents). (*Withdrawn*).

0818-77-U: Francesco Sdao (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

0847-77-U: United Brotherhood of Carpenters and Joiners of America Local 249, Kingston, and Angus Froats the Business Agent for the Union (Complainant) v. Environmental Technical Services Inc., Including the Company Supt. a Mr. Al West (Respondent). (*Dismissed*).

0851-77-U: Iolanda Orsini (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

0853-77-U: Concetta Vitelli (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

0856-77-U: United Steelworkers of America (Complainant) v. Namasco Limited (Respondent). (*Withdrawn*).

0885-77-U: Canadian Food and Associated Services Union (Complainant) v. Federated Building Maintenance Company Limited (Respondent). (*Withdrawn*).

0905-77-U: Canadian Food and Associated Services Union (Complainant) v. Windsor Arms Hotel Limited (Respondent). (*Withdrawn*).

0915-77-U: United Cement, Lime and Gypsum Workers International Union (Complainant) v. Miserer Beverages Ltd. (Respondent). (*Withdrawn*).

0921-77-U: Local Union 3054 of The United Brotherhood of Carpenters and Joiners of America (Complainant) v. Bendix Home Systems Ltd., Hensall, Ontario (Respondent). (*Withdrawn*).

0936-77-U: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Complainant) v. Andron Agencies Limited (Respondent). (*Withdrawn*).

0957-77-U: Labourers' International Union of North America, Local 1059 (Complainant) v. Lenford Construction Limited (Respondent). (*Withdrawn*).

0958-77-U: Labourers' International Union of North America, Local 1059 (Complainant) v. David L. Coatsworth Construction, David Coatsworth and Gary Kilbourne (Respondents). (*Withdrawn*).

0972-77-U: Canadian Food and Associated Services Union (Complainant) v. Federated Building Maintenance Company Limited (Respondent). (*Withdrawn*).

0976-77-U: Tom Mason (Complainant) v. Teamsters Union Local 647 Donlands Dairy Ltd. (Respondents). (*Withdrawn*).

APPLICATION UNDER SECTION 39

0812-77-M: Miss Sharon Kay Flint (Applicant) v. Canadian Union of Public Employees Local 2035 (Respondent Trade Union) v. Corporation of the City of Brockville (Respondent Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

0315-77-R: Boot and Shoe Workers' Union, AFL, CIO, CLC (Applicant) v. Terra Footwear Limited (Respondent). (*Withdrawn*).

0477-77-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel & Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. 251628 Holdings Limited trading as Jimmy'z II (Respondent). (*Granted*).

0866-77-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local 880 Affiliated with the Inter-

national Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Conklin Lumber Company Limited (Respondent) v. United Brotherhood of Carpenters and Joiners of America, Millworkers Local 802 (Intervener). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0721-77-M: The Corporation of the Town of Oakville (Applicant) v. The Canadian Union of Public Employees and its Local 1329 (Respondent). (*Terminated*).

0874-77-M: Sunnybrook Hospital Employees Union Local 777 (Applicant) v. Sunnybrook Hospital (Respondent). (*Dismissed*).

REFERENCES TO BOARD PURSUANT TO SECTION 96

0718-77-M: The Lennox and Addington County Board (Employer) v. Canadian Union of Public Employees and its Local 1558 (Trade Union).

0719-77-M: Dravo of Canada Limited (Employer) v. United Brotherhood of Carpenters & Joiners of America, Local 2486 (Trade Union).

APPLICATIONS UNDER SECTION 112A

0271-77-M: Local Union 2965, The Resilient Floor Workers, United Brotherhood of Carpenters and Joiners of America A.F.L. – C.I.O. (Applicant) v. Cannon Carpet Installation Ltd. (Respondent). (*Granted*).

0375-77-M: L.I.U.N.A. Local Union No. 597 Council of Trade Unions (Applicant) v. Tripp Construction Limited (Respondent). (*Withdrawn*).

0552-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. Town Paving Company (1965) Limited (Respondent). (*Withdrawn*).

0613-77-M: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Ponti Group Masonry Ltd. (Respondent). (*Terminated*).

0616-77-M: Labourers' International Union of North America, Local 1036 (Applicant) v. Wilputte Canada Limited (Respondent). (*Withdrawn*).

0618-77-M: Lake Ontario District Council, on behalf of Locals 397, 572, 1071, 1450 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Normand & Fleming Ltd. (Respondent). (*Granted*).

0621-77-M: Local 120 I B E W , International Brotherhood of Electrical Workers (Applicant) v. Ontario Electrical Construction Co. Ltd. (Respondent). (*Withdrawn*).

0729-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Arlington Crane Service Limited and Crane Rental Association of Ontario (Respondents). (*Granted*).

0804-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Toronto & District Excavators Association and its affiliate Colosimo Bros. Excavating (Respondent). (*Withdrawn*).

0807-77-M: Local Union 2965, The Resilient Floor Workers United Brotherhood of Carpenters and Joiners of America, A.F.L.- C.I.O. (Applicant) v. Cannon Carpet Installation Ltd. (Respondent). (*Granted*).

0808-77-M: Local Union 2965, The Resilient Floor Workers United Brotherhood of Carpenters and Joiners of America A.F.L. – C.I.O. (Applicant) v. The Resilient Flooring Contractors Association of Ontario and Rickey-Reid Ltd. (Respondents). (*Granted*).

0822-77-M: The Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Petrisan Construction Ltd. (Member Company of Toronto & District Excavators Association) (Respondent). (*Withdrawn*).

0823-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly known as Toronto Formwork Association) and Vetro Construction Ltd. (Respondent). (*Withdrawn*).

0824-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly known as Toronto Formwork Association) and Inter United Carpenters Ltd. (Respondent). (*Withdrawn*).

0825-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly known as Toronto Formwork Association) and Dominion Worthwhile Ltd. (Respondent). (*Withdrawn*).

0826-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly known as Toronto Formwork Association) and Force Construction Limited (Respondent). (*Withdrawn*).

0827-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly Known as Toronto Formwork Association), and Koala Construction (Respondents). (*Withdrawn*).

0828-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly known as Toronto Formwork Association) and Russel Forming Ltd. (Respondent). (*Withdrawn*).

0829-77-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Formwork Association (Formerly known as Toronto Formwork Association) and Garnet Construction Ltd. (Respondent). (*Withdrawn*).

0834-77-M: A Council of Trade Unions, acting as the Representatives and Agent of Teamsters, Local Union No. 230 and Labourers' International Union of North America, Local 597 (Applicant) v. Tripp Construction Limited (Respondent). (*Withdrawn*).

0845-77-M: The Labourers' International Union of North America, Local 183 (Applicant) v. Alpha Forming Corp. Ltd. (Respondent). (*Withdrawn*).

0846-77-M: International Union of Operating Engineers, Local 793 (Applicant) v. Ontario Erectors Association and its Affiliate Yukon Crane Company (Respondents). (*Withdrawn*).

0877-77-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93 (Applicant) v. Brian Tourangeau Limited (Respondent). (*Withdrawn*).

0892-77-M: Sheet Metal Workers' International Association Local Union 235 (Built-Up Roofers, Damp and Waterproofers Section of Sheet Metal Workers' International Association, Local Union 235) (Applicant) v. Built-Up Roofing Contractors Section of the Windsor Construction Association and Riverside Roofing Ltd. (Respondents). (*Withdrawn*).

0904-77-M: The Labourers' International Union of North America, Local 183 (Applicant) v. A. R. G. Contracting Co. Ltd. (Respondent). (*Withdrawn*).

0937-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Markham Plumbing and Heating and the Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

0938-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. George A. Kelson Co. Ltd., and the Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

0940-77-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Dimarco Plumbing & Heating Co. Ltd. and The Metropolitan Plumbing and Heating Contractors Association, a Division of the Mechanical Contractors Association of Toronto (Respondents). (*Withdrawn*).

0953-77-M: International Union of Operating Engineers, Local 793 and its Member Darcy B. Bourdage (Applicant) v. Mort's Crane Rental (Respondent). (*Withdrawn*).

0966-77-M: Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Ross Hartrick Co. Limited and The Ontario Painting Contractors Association (Respondents). (*Withdrawn*).

APPLICATION FOR RECONSIDERATION OF BOARD'S DECISION

0534-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mor-Alice Construction Limited (Respondent). (*Request Denied*).

ONTARIO LABOUR RELATIONS BOARD

Monthly Case Breakdown—Disposition and Comparison for September 1977 (fiscal year 1977-78)

Case Type	Applications Received		Total Disposed of			Disposed of During: Sept.			Disposed of Last Month			
	During: Sept.	Last Month	During: Sept.	Last Month	Granted	Dismissed	Withdrawn	Pending	Granted	Dismissed	Withdrawn	Pending
Certification	82	68	75	88	48	23	4	178	60	18	10	179
Termination	3	6	2	4	2	—	—	14	3	—	1	12
Section 1(4)	—	—	1	—	—	—	—	8	—	—	—	1
*Successor Status	4	10	8	1	7	—	1	19	—	1	—	8
Accreditation	1	—	—	—	—	—	—	7	—	—	—	7
Unlawful Strike	—	—	2	—	—	—	—	2	30	—	—	—
Unlawful Lockout	—	—	—	—	—	—	—	1	—	—	—	1
Prosecutions	7	1	7	6	—	4	3	112	2	2	2	114
Section 79	32	36	29	34	4	5	20	182	7	7	20	180
**Declaration of Unlawful Strike or Lockout	3	1	3	4	—	1	2	67	1	1	2	67
***Misc.	38	23	33	16	8	2	23	195	3	3	10	198
Bill 139	—	1	1	—	—	—	1	—	—	—	—	1
TOTAL	170	146	160	154	69	35	56	813	76	32	46	805

*Sections 54 and 55 are consolidated.

**Sections 123, 82, 83 and 63 are consolidated.

***Sections 37, 39, 44(3), 76, 81, 95(2), 96 and 112(a) are consolidated.

NOTE: The Pending figures found directly beside the section "Disposed of During: _____" are a consolidation of those cases received during the month and pending into the next, and the pending cases from the previous month.

ONTARIO LABOUR RELATIONS BOARD

Semi-Annual Report for April 1, 1977 to Sept. 30th, 1977

Case Type	Applications Received	Total Disposed of During Period	Disposition			Pending as of September
			Granted	Dismissed	Withdrawn	
Certification	499	494	344	88	62	178
Termination	34	41	24	9	8	14
Section 1(4)	4	2	-	1	1	8
Successor Status	25	32	26	2	4	19
Accreditation	1	1	1	-	-	7
Unlawful Strike	4	4	1	-	3	30
Unlawful Lockout	3	2	-	-	2	1
Prosecutions	43	27	2	7	18	112
Section 79	220	182	23	35	124	182
Declaration of Unlawful Strike, or Unlawful Lockout	43	32	5	7	20	67
Miscellaneous	167	114	26	13	75	195
Bill 139	2	2	-	-	2	-
TOTAL	1045	933	452	162	319	813



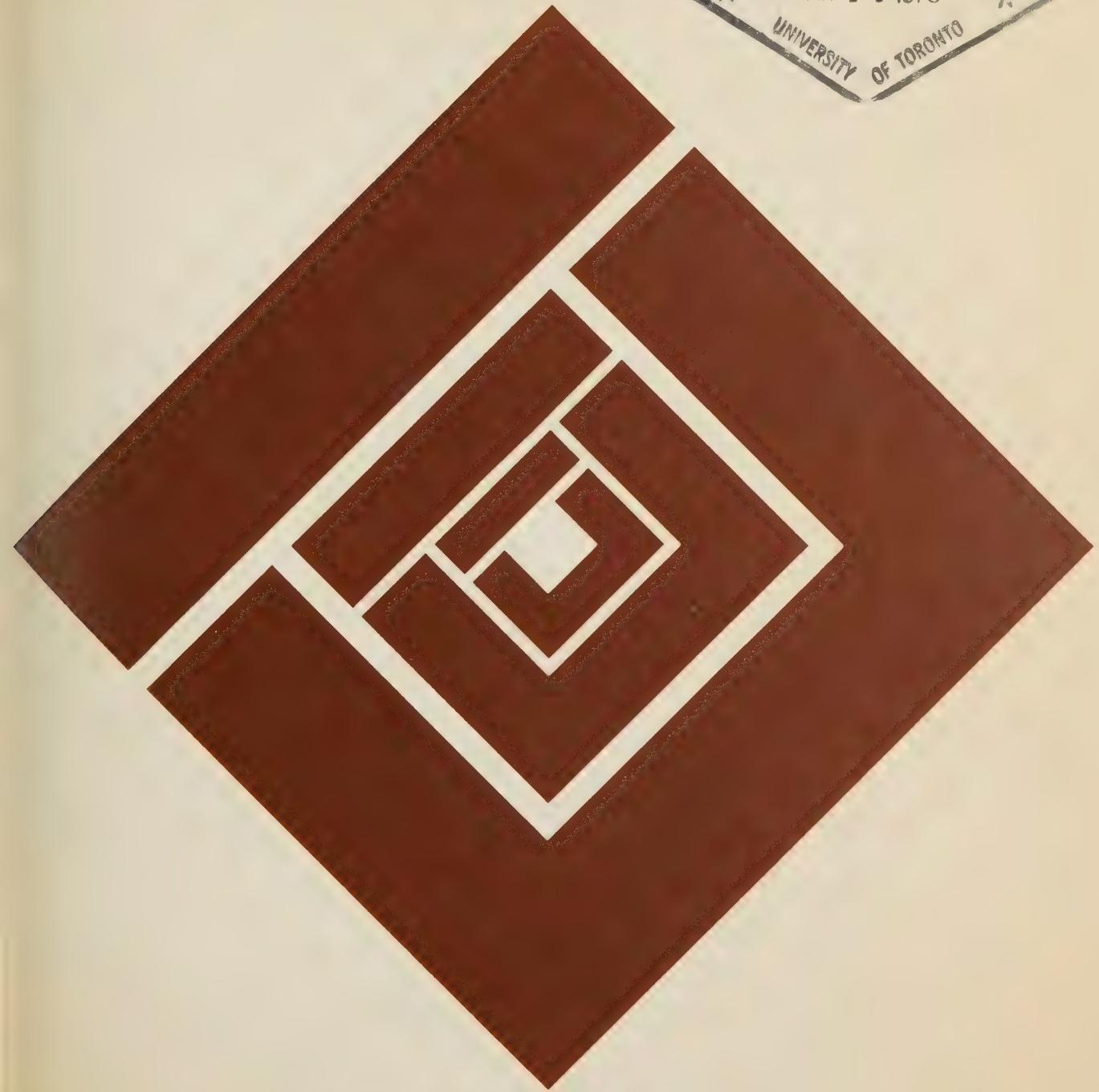
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ONTARIO LABOUR RELATIONS BOARD

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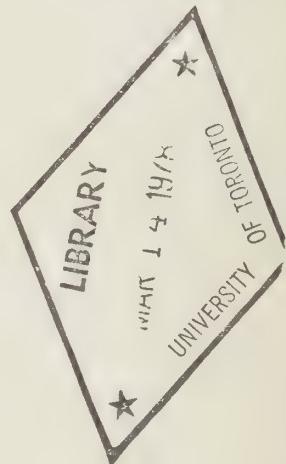
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ONTARIO LABOUR RELATIONS BOARD REPORTS

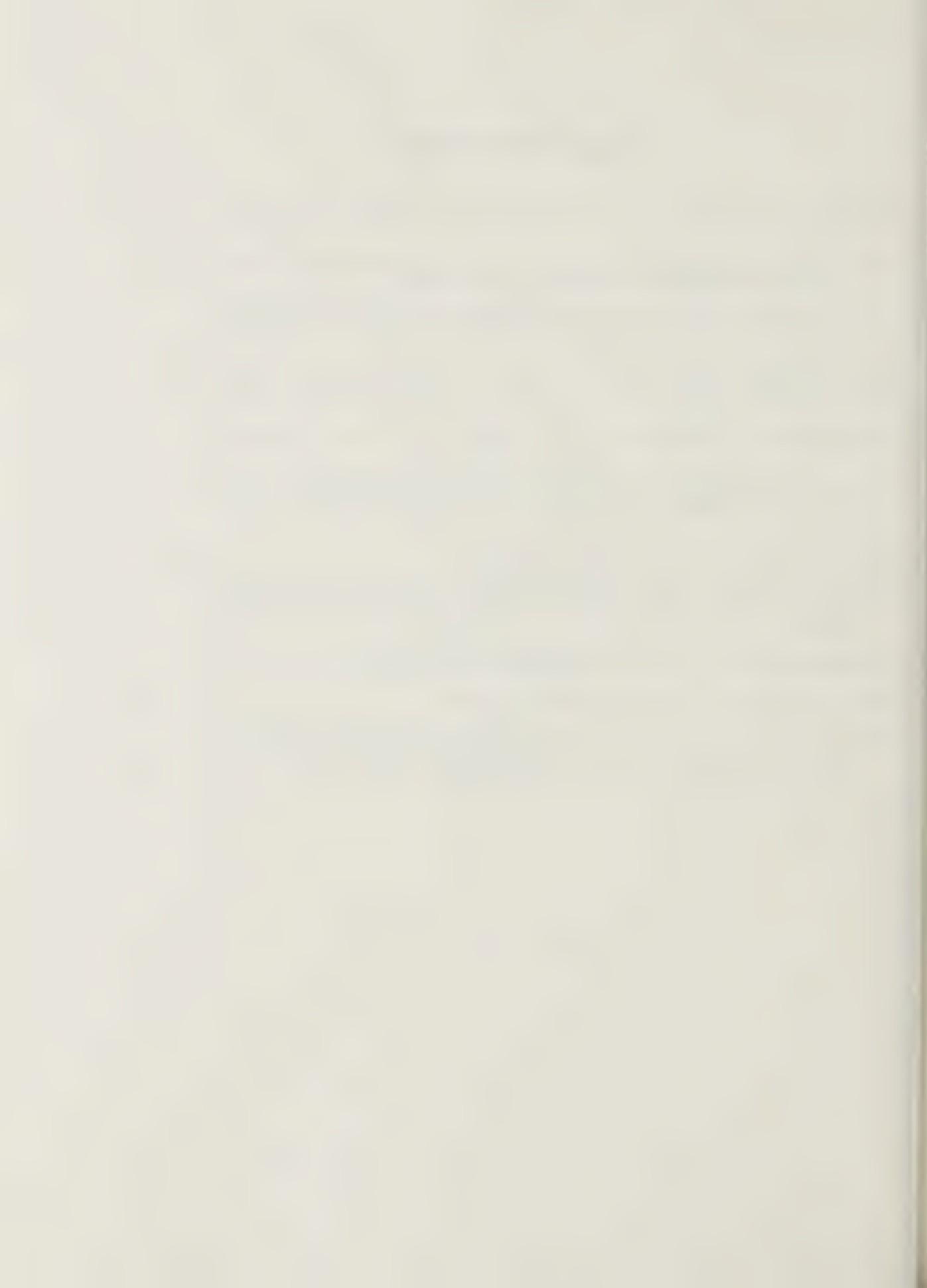
A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1977] OLRB REP.

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.

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OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 124, ET AL v. ZAPH CONSTRUCTION LTD. v. LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCALS 183 AND 527; AND OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 124, ET AL v. ZAPH CONSTRUCTION LTD., ET AL v. LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 527

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S.79 – Duty of Fair Representation – Whether union settlement of employee grievance constitutes breach of its statutory duty.

ROGER ST. GEORGE v. LUMBER AND SAWMILL WORKERS' UNION, LOCAL 2693 v. E.B. EDDY FOREST PRODUCTS LTD.

762

S.79 – Duty of Fair Representation – Whether union failure to process grievance constitutes breach of duty – Effect of substantial delay in filing complaint.

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NELSON CRUSHED STONE, ET AL v. UNITED CEMENT, LIME & GYPSUM WORKERS' INTERNATIONAL UNION, AFL-CIO-CLC, LOCAL UNION 494, ERIC BATTEN, ET AL v. NORMAN H. MARTIN

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Termination – Timeliness – Collective Agreement – Whether termination application untimely where collective agreement initially rejected but subsequently accepted by a second ratification vote.

GALDINO BERDWSCO, PETER McLEAN, DON LODER v. UNITED STEELWORKERS OF AMERICA

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Timeliness – Termination – Collective Agreement – Whether termination application untimely where collective agreement initially rejected but subsequently accepted by a second ratification vote.

GALDINO BERDWSCO, PETER McLEAN, DON LODER v. UNITED STEEL-WORKERS OF AMERICA

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1054-77-U Nelson Crushed Stone, A Division of King Paving & Materials, A Division of the Flintkote Company of Canada Limited, (Applicant), v. United Cement, Lime & Gypsum Workers' International Union, AFL-CIO-CLC, Local Union 494, Eric Batten and others as listed on attached Schedule "A", (Respondents), v. Norman H. Martin, (Respondent).

Strike – Collective Agreement – Whether refusal to cross a picket line is a strike – Effect of clause in collective agreement preventing an employee from being disciplined if he refuses to cross – Whether employee activity is "concerted".

BEFORE: Arthur L. Haladner, Vice-Chairman.

APPEARANCES: *W. McNaughton, D. Ashwell and D. Barnes for the applicant; Martin Levinson, Paul Cavalluzo and Eric Batten for the respondents; Norman Martin and H. G. Martin for the respondent.*

DECISION OF THE BOARD; November 16, 1977.

I

1. The applicant, Nelson Crushed Stone, operates a quarry on the Guelph Line, near Burlington. The respondent trade union, Local 494 of the United Cement, Lime & Gypsum Workers' International Union, has held bargaining rights for the employees who work in that quarry since February of 1968.

2. On February 22, 1977, the Mount Nemo Truckers' Association was certified for a unit of dependent contractors working at or out of the applicant's quarry. The members of the Association have been on a legal strike for a first agreement since September 15, 1977. On that day, Association pickets appeared at the entrance to the quarry and were respected by Local 494 members. As of the date of the Board's hearing into this matter, none of the members of the Local 494 bargaining unit, with the exception of Dave Palmateer, a probationary employee, had reported for work, although work has been scheduled for the entire period in question.

3. The applicant and the respondent trade union are parties to a subsisting Collective Agreement which expires February 15, 1978. The agreement contains the usual provision against strikes and lock-outs, Article 4.01, and the following Article 4.02:

It shall not be a violation of the Agreement or cause for discharge or discipline if any employee refuses to cross a Picket Line which has been established in full compliance with the existing laws.

4. On October 3rd, the applicant filed an application for a declaration and direction pursuant to section 82 of The Labour Relations Act. The application alleges that the 74 em-

ployees named therein have, by refusing to attend at work, engaged in a "strike" contrary to section 63(1) of The Labour Relations Act, and that the officials of Local 494 have supported, encouraged and counselled an unlawful strike, contrary to section 65 of the Act. This matter was heard by the Board on Tuesday, October 11th, and Friday, October 14th. On Monday, October 17th, the parties were informed by telephone that the Board would not be issuing a declaration or direction. What follows are the reasons for that decision.

II

5. The strike by the Association members commenced at 12:00 a.m. on the morning of September 15, 1977. Shortly thereafter, a number of trucks pulled up to the quarry gates with signs stating that the Association was on strike against the applicant. There were a number of Local 494 members at work on the night of September 14th/15th. All of these employees completed their shifts.

6. By the time the day shift workers began arriving at the quarry, most of the members of the Association were engaged in picketing at the quarry entrance. The evidence is that between 20 and 30 tandem trucks were lined up on both sides of the quarry gates and that about 30 truckers were walking back and forth between the gates with picket signs. There were a number of police cruisers in attendance.

7. None of the members of the Local 494 bargaining unit who arrived at the quarry on the morning of September 15th reported for work. The employees, after encountering the picket line, moved across the street where they waited until arrangements could be made for them to receive their pay, which was then owing. Ed Mattocks, the Secretary Treasurer of Local 494, made an arrangement with the employer on the morning of the 15th whereby the men would come into the quarry two at a time and pick up their cheques. This arrangement was approved by a member of the Truckers' Association executive. Most of the employees picked up their paycheques on the morning of the 15th. Those who did not were sent cheques in the mail. After collecting their pay, the employees left the quarry and, with one exception, they have not returned.

8. The next day, September 16th, all of the members of the Local 494 bargaining unit were sent a letter signed by Abraham Hartman, the applicant's Assistant Operations Manager. The text of that letter is as follows:

Please be advised that you are still scheduled and required to report for your usual position at normal times. If in doubt about shift or starting times, please contact superintendent's office at 335-5245. We expect you to be at work at all days in accordance with your normal schedules.

We draw your attention to the following article in the collective agreement: Article 4.01 "The Company agrees that it will not cause or direct any lockout of its employees, and the Union agrees that there will be no strikes or other collective or individual action which will stop or interfere with production, and that if any such collective or individual action should be taken, it will instruct its members to carry out the provisions of this Agreement and to return to work and perform their duties in the usual manner." We also refer you to The Labour Rela-

tions Act 63(1) "Where a collective agreement is in operation, no employee bound by the agreement shall strike, and no employer bound by the agreement shall lock out such an employee".

It is perfectly legal and proper that you attend work, and in fact by refusing to work you are engaging in an unlawful strike contrary to The Labour Relations Act and the collective agreement.

9. With the exception of Mr. Palmateer, who reported for work on September 20th, the letter was not successful in securing the return to work of any of the employees; and so, on September 23rd, Hartman sent out this further letter:

Further to my letter to you of September 16, 1977, this is to advise that Nelson Crushed Stone continues to expect you to work in accordance with normal work schedules at the quarry. I want to make it very clear that work for you is both scheduled and available.

I again emphasize that your continued refusal to attend work is a violation of both your Union Collective Agreement with the Company and of The Labour Relations Act of Ontario.

The Labour Relations Act states as follows:

Section 36(1) "Every collective agreement shall provide that there will be no strikes or lock-outs so long as the agreement continues to operate.

(2) If a collective agreement does not contain such a provision as is mentioned in subsection 1, it shall be deemed to contain the following provision."

"There shall be no strikes or lockouts so long as this agreement continues to operate."

As you are aware, your collective agreement is still in effect until February 14, 1978. Therefore, in our view you are violating The Labour Relations Act by not attending to work.

Please be advised that a violation of The Labour Relations Act can have the following consequences:

Section 85(1) "Every person, trade union, council of trade unions or employers' organization that contravenes any provision of this Act or of any decision, determination, interim order, order, direction, declaration or ruling made under this Act is guilty of an offence and on summary conviction is liable,

- (a) if an individual, to a fine of not more than \$1,000; or
- (b) if a corporation, trade union, council of trade unions or employers' organization, to a fine of not more than \$10,000.

(2) Each day that a person, trade union, council of trade unions or employers' organization contravenes any provision of this Act or of any decision, determination, interim order, order, direction, declaration or ruling made under this Act constitutes a separate offence.

(3) Every fine recovered for an offence under this Act shall be paid to the Treasurer of Ontario and shall form part of the Consolidated Revenue Fund."

10. Neither of the employer's letters contained any reference to Article 4.02, the picket line clause. However, the September 16th letter drew the attention of the employees to the immediately preceding Article, Article 4.01, the no-strike provision of the Collective Agreement.

11. Mr. Hartman testified it was his understanding that The Labour Relations Act overrode Article 4.02 and that the Article was of no relevance to whether the employees came in or not. He testified further that the letters were intended to get the employees back to work and that he made a conscious decision to make no reference to Article 4.02.

12. The evidence establishes that Article 4.02 was in the previous collective agreement between the applicant and Local 494 and that the question of the legality or illegality of the Article was not raised during the negotiations for the current agreement. This Agreement was signed at the beginning of September, 1977, just two weeks before the commencement of the Association's strike.

13. Apart from one incident, there was no evidence of any physical violence occurring on the picket line or of any damage to property. During the course of the strike, a customer of the applicant was struck in the face by one of the truckers while hauling material out of the quarry and assault charges were filed. This incident, which was reported in the Hamilton Spectator, occurred while the customer was attempting to take pictures of the picketers. Despite this one incident, the salaried staff of the applicant worked throughout the strike. Apparently they had no difficulty crossing the Association's picket line. There were two police officers in attendance at starting times.

14. Two incidents occurred off the picket line during the first week of October. In one, an incident occurring about a quarter mile from the quarry, rocks were thrown at a convoy of King Paving trucks which were, at the time, under police escort. King Paving trucks were used by the applicant during the strike to run material in and out of the quarry.

15. Eric Batten, the District Representative for Local 494, and a signatory to the Collective Agreement, was retained without pay as a consultant by the Truckers' Association during the negotiations for the Association's meetings with the applicant in which he acted as the Association's spokesman.

16. On September 13th, Local 494 held a general membership meeting. This meeting, which was called for the purpose of electing the next negotiating committee as well as to elect delegates for an October convention in Montreal, was attended by about sixty per cent of the Local 494 membership. During the course of the meeting, which was chaired by Richard Giddings, the President of Local 494, one of the employees stood up and inquired

whether there would be a strike by the truckers. Batten replied that it looked as if there might be. At this point, the employee suggested that a vote might be taken on the question of whether the members should or should not cross the Association's picket line. Batten stated at that time that it would not be legal to take a vote on that question, that it was up to each individual to decide whether he would cross or not cross, and, further, that the union had no right to instruct the members one way or the other. Batten then drew the attention of the members to Article 4.02.

17. After the meeting on the 13th, Batten gave instructions to Giddings that he should, in the event of a strike, occasionally check the picket line to advise any Local 494 members who might be in attendance that it was the Association's difference and not theirs. Giddings testified that he checked the line once a day to make sure that no Local 494 members were involved.

18. Donald Ashwell, the applicant's quarry manager, testified that he observed Batten at the quarry on several occasions during the course of the strike, and that on September 29th, he saw Batten with a picket sign. He did not see any Local 494 members in attendance. Mr. Ashwell was at the quarry every day except for October 7th.

19. Hartman testified that he saw Batten on October 4th standing at the side of the road with a group of people he recognized as truckers. He did not recognize any Local 494 members.

20. Batten testified that he attended at the picket line two or three times a week for short periods of time (approximately one half hour). He testified further that although he had not actually "walked the line", he had, on occasion, handed picket signs to Association members with the direction to keep walking.

21. Batten testified that, apart from the meeting referred to above, he did not speak to any members of Local 494 about their conduct regarding the picket line and that he never instructed any Local 494 member not to report for work. Nor did he ever instruct the members to return to work and perform their duties.

22. The respondents called six employees to give evidence as to the reasons for their non-attendance at work.

23. John Casper testified that he had been intimidated by one of the picketers on the morning of September 15th and that he did not want to take a chance going across the line. He also testified that he had a clause in his contract which stated that he did not have to cross a legal picket line and that he had exercised that right. Under cross-examination, he testified that he believed the clause meant that nothing whatsoever would happen to him if he refused to cross.

24. Al Boucher, an employee on the night shift, testified that he had not attempted to work since completing his shift on the night of September 14th/15th. He testified that he could see no reason to do so as the Collective Agreement gave him the right not to cross a legal picket line. He also testified that he perceived some danger in going across the line. In this regard, he stated that he had heard that some trucks had had their radiators pushed in some years ago near the quarry and that he did not want to get involved in things like that, for his own safety as well as that of his vehicle.

25. Ron Belmore stated that he did not cross the picket line on the morning of the 15th because he knows what truckers' strikes are like, having been a trucker himself some years ago. Under cross-examination, he testified that he did not attend the membership meeting on September 13th and that he did not know whether Batten had anything to do with the Truckers' Association.

26. Richard Giddings, the President of Local 494, Stan McNeill, the Vice-President and Ed Mattocks, the Secretary Treasurer, also gave evidence before the Board. They testified that they did not instruct any of the employees either to cross or not to cross the Association's picket line, and it was not suggested that they had. Giddings and McNeill both testified that they believed they would need police protection to cross the Association's picket line.

27. Mattocks testified that he personally did not cross the line for three reasons: first, because of the principle of not crossing a picket line; second, because Article 4.02 provided that a man would not be disciplined or dismissed for not crossing a legal picket line; and third, because he had just got his first decent car in years and did not want it or himself wrecked. Under cross-examination, Mattocks indicated that he was surprised that the salaried employees had crossed the line without incident, but that he would be treated differently because of his membership and position with the union.

III

28. The facts of this case – a refusal by members of one union to cross a picket line maintained by members of another union who are legally on strike against a common employer, where the collective agreement between the employer and the "non-striking" union contains a provision stating that it shall not be a violation of the agreement (or cause for discharge or discipline) if any employee refuses to cross a legal picket line – raise again the question of the precise scope of the strike definition contained in section 1(1)(m) of The Labour Relations Act. That definition reads:

"strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or a slow-down or other concerted activity on the part of the employees designed to restrict or limit output;

29. The Board, when applying the statutory definition, has not drawn a distinction between a refusal by employees to cross a picket line and other types of employee activity which result in a disruption of an employer's operation. In all cases, the question is whether the refusal to work on the part of the employees is in combination, in concert, or in accordance with a common understanding within the meaning of section 1(1)(m). In this regard, the Board has held that the definition of "strike" is not restricted or qualified by the purpose underlying the work stoppage. The Board, moreover, does not allow the parties to qualify the no-strike provision deemed to be contained in every collective agreement. The Board has held that provisions which purport to legalize strike activity during the contract term embody attempts by the parties to contract out of The Labour Relations Act and are, to that extent, invalid.

30. Counsel for the respondents in this matter contended that both of these well-es-

tablished approaches of the Board have been wrong and should not be followed. First, it was argued, that the Board should adopt a purposive approach to the definition of "strike", having regard to the nature of the activity of lawful picketing, and hold that the respecting of a lawful picket line by employees who have no collective bargaining dispute with the picketed employer does not constitute a strike. Second, it was argued, that the decisions of the Board which have held that picket line clauses are invalid, as contrary to The Labour Relations Act, are inconsistent with the scheme of the Act and give insufficient recognition to the principle of freedom of contract as reflected in the preamble and in section 42. Each of these arguments will be considered at some length.

IV

31. The argument that the Board should qualify the definition of "strike" by reference to the underlying purpose of the work stoppage was specifically rejected by the Board in the *Domglas* case ([1976], OLRB Rep. Oct. 569). In *Domglas*, the Board held that the two conditions specified on the face of the statute – concerted employee activity and disruption of the employer's operation – are the only conditions essential for the characterization of a work stoppage as a strike, and that the further condition that the conduct be carried out for the purpose of obtaining concessions from an employer should not be read into the definition.

32. But counsel argued that the *Domglas* decision can be distinguished on the ground that the Board, in *Domglas*, did not recognize any legitimate labour relations interest in employees refusing to work on the National Day of Protest; whereas such an interest is present in the case of a refusal by employees to cross a legal picket line. Counsel pointed out that picketing has been recognized by the Courts as a legitimate economic weapon. The theme of the cases decided at common law, counsel says, is that primary picketing, in furtherance of a lawful strike, is legal so long as it does not run afoul of the general law. To deny employees, even those bound by a collective agreement, the right to honour a legal picket line is, therefore, counsel says, to ensure that the picket line will be ineffective in achieving the very purpose for which it was established; in the instant case, to persuade the members of Local 494 from going to work in the applicant's quarry. It would, moreover, counsel says, be to "de-legalize" conduct which flows from lawful conduct and thus to tip the balance of bargaining power in favour of the employer. From this premise, counsel argued that the Board should remain neutral and only find a strike where the respecting of a picket line was done for the specific purpose of bringing economic pressure to bear on the picketed employer.

33. The special protected status which counsel claims for the activity of lawful picketing does not exist in the province of Ontario. While it is true that the right of employees engaged in a lawful strike to peacefully picket at the site of the strike has been recognized, there has been no express legal recognition, either in The Labour Relations Act or at common law, of the right of employees bound by a collective agreement to honour the picket line of another union, whether legal or illegal. The absence in this province of legislation dealing with the problem of picketing is to be contrasted with the situation which exists in British Columbia where the Legislature has enacted an elaborate statutory framework to deal with picketing and the work stoppages it may produce. A qualification of the strike definition contained in The Labour Relations Act so as to permit a concerted refusal by employees to cross a picket line during the term of a collective agreement would not result,

therefore, in the Board taking a neutral position as argued by counsel for the respondents. On the contrary, if the Board were to apply the definition of "strike" in the manner suggested, it would be effecting a fundamental change in the balance of collective bargaining power in this province. Such a change, if it is to be effected, should be undertaken by the legislature and not by the Board.

34. None of the Board's previous decisions provide support for such a qualification of the strike definition. *Harding Carpets Limited*, 56 CLLC ¶18030, *North Simcoe Electrical Contracting Limited*, [1973] OLRB Rep. June 336 and *Wheelabrator Corporation of Canada Limited*, [1974] OLRB Rep. July 490, the cases cited by counsel for the respondents, do not advance the argument.

35. The uncontradicted evidence of the employer in *Harding* established that the work stoppage in that case had been instigated by the trade union and, further, that it had been instigated for the sole purpose of bringing economic pressure to bear in the context of pending negotiations. The Board was thus able to conclude that the employees, in refusing to work, had acted in concert. The *Harding* decision does contain certain statements to the effect that a concerted refusal to work should not always be considered a "strike". However, these statements, when viewed in their historical context, are not in any way inconsistent with the position taken by the Board in *Domglas*. (See, in this regard, *John Inglis Co. Limited*, 53 CLLC ¶17049 and paragraph 62 herein.)

36. In *North Simcoe*, an application brought under section 123 (the section which gives the Board remedial jurisdiction to deal with illegal strikes in the construction industry), the employer, a sub-contractor on a construction project, was subjected for three days to what can loosely be described as recognition picketing. In refusing to exercise its discretion to grant a cease-and-desist order, the Board noted that the employer had not suffered any harm since there was no indication that the picketing had actually deterred any of the employer's employees from coming to work or that it had resulted in any economic pressure being brought to bear. Absent then from this situation was the necessary element of a disruption of the employer's operation.

37. The *Wheelabrator* decision is authority for the proposition that the Board may issue a direction enjoining picketing in the construction industry where that picketing does not arise out of lawful collective bargaining. It is not authority for the proposition that a refusal to cross a legal picket line cannot, in the absence of a collective bargaining purpose, amount to a strike. The picketing which occurred in *Wheelabrator* was designed to obtain for the picketers work which was being performed by members of another union.

38. Reference was also made to *Furness Withy & Co. Ltd.*, [1974] 44 DLR (3d) 758, an oral decision of the Supreme Court of New Brunswick, which held that the honouring of a picket line does not constitute a strike under the Canada Labour Code. While this decision may be of some persuasive value, it does not override the long-established approach that the Board has taken where there has been a concerted refusal to cross a picket line.

39. A further argument was advanced by counsel for the respondents in support of qualifying the strike definition found in The Labour Relations Act. Counsel argued that the Ontario definition of strike, if applied literally, is too broad in that it catches situations which obviously could not have been intended by the Legislature to constitute a "strike".

Counsel offered as examples the situations where a group of employees decide together to stay away from work in order to go fishing, and the situation where employees decide as a group either not to work or to cease working in an area which is unsafe. The Board has been given, in section 82 of The Labour Relations Act, an explicit discretion not only as to whether it will issue a direction where employees have engaged in an unlawful strike, but also as to whether it will issue a declaration. This latter discretion can be used by the Board in situations where the granting of a declaration would be unfair or absurd.

40. The Board's conclusion is that the legality of a refusal by employees to cross a picket line, whether legal or illegal, is to be tested in the same fashion as any other employee activity which results in a disruption of the employer's operation during the contract term, namely, whether the refusal to work is "In combination, or in concert or in accordance with the common understanding" within the meaning of section 1(1)(m) of The Labour Relations Act.

V

41. The consideration of Article 4.02, the picket line clause, requires a further examination of the definition of strike found in The Labour Relations Act. The primary definitional matter in dispute relates to the precise scope of the requirement for concerted employee activity. Also at issue is the meaning to be given to the phrase "in accordance with a common understanding".

42. Not surprisingly, counsel for the respondents and counsel for the applicant offered conflicting interpretations of the scope of the requirement for concerted employee action. In support of their contention that a refusal to cross a picket line should not normally be viewed by the Board as a concerted activity, counsel for the respondents gave as an example the situation of a large dinner party which includes among its guests a number of vegetarians, none of whom have ever before met. When the main course, a meat dish, is served, each of the vegetarians in turn refuses to eat. In these circumstances, counsel says, it can hardly be said that the vegetarians have acted in concert, although their actions are identical and motivated by a common aversion to meat. So, too, in the case of a picket line, where employees, for whatever reason, decide independently not to cross and go to work.

43. In support of his contention that a refusal by all, or almost all of the employees in a bargaining unit, to cross a picket line is *inherently* a concerted activity, counsel for the applicant gave as his example the situation of an orchestra where all the instruments, although played by different individuals, and independently of each other, nevertheless come together to achieve a harmonious sound. By the same token, counsel says, if all or almost all of the employees in a particular bargaining unit refuse to work in circumstances where there is work scheduled, the Board can, and *must*, infer from this fact that the employees have acted in concert.

44. While both of these analogies are helpful in focusing the issue, neither fully captures the essence of the statutory requirement that there be concerted activity on the part of employees. The problem with the respondents' analogy is that it does not reflect the normal labour relations realities. While it is a fact of contemporary labour relations that union members do not like to cross the picket line of another union, regarding such action, as they do, as inconsistent with their support for the cause of trade unionism, the Board's experi-

ence in a great number of cases has been that, with certain exceptions, employees in the industrial sector of this province will cross the picket line of another union when required by their employer. This is no doubt, in part, because they realize that their obligation to their employer must take precedence over their commitment to the cause of unionism. In short, principle must, of necessity, yield to the practical realities of the employment relationship in which employees are normally subject to discharge or discipline in the event of an insubordinate refusal to work. A further problem with the analogy provided by counsel for the respondents is that it ignores the fact that union members who refuse to cross a picket line have already come together as a group for purposes of collective bargaining. Thus there is a potential for concerted action which does not exist in the case of vegetarians who attend a dinner party having had no previous contact with one another.

45. The applicant's analogy, while of more general application, fails to recognize the possibility which is illustrated by the analogy of the respondents – that all of the employees in a particular bargaining unit may refuse, on an individual basis, to cross a picket line, notwithstanding their commitment to their employer. An obvious example of such an occurrence would be a simultaneous refusal to cross a picket line marked by physical violence. As the Board noted in *Acme Building*, [1975] OLRB Rep. Nov. 810, (a case which suggested that a single employee of one employer could, by joining with employees of another employer, be said to be engaging in a "strike") the concept of strike, both at common law and by statutory definition, entails collective concerted action. There must be, the Board stated, "some co-ordination of activity" as well as commonality of interest. Put in the language of the symphony, the applicant's analogy forgets the need for the conductor.

46. The jurisprudence of the Board does not support the proposition that coincidental, as opposed to concerted, activity is the kind of collective activity which is prohibited during the life of a collective agreement. In all the cases in which the Board has issued a strike declaration, there was before it either evidence that the refusal by the employees to work was instigated by the trade union or evidence in the circumstances surrounding the work stoppages from which the Board could draw the inference that the employees had acted together and not simply as individuals. If it were otherwise, a multiplicity of individual refusals to work where there was work scheduled would amount to a strike. While many of the cases in the picket line context are, because of the need for expedition, lacking in extensive analysis, in no case has the Board held that a finding of concerted activity follows automatically upon a finding that all, or almost all, of the employees in a bargaining unit have respected a picket line. The cases, particularly the ones containing detailed reasons, reflect a real concern that the inference of a concerted activity be one that can fairly and reasonably be drawn from the facts as they emerge at the hearing.

47. The Board is not unmindful of the difficulties of proving concerted action. In recognition of the fact that specific evidence of concerted action is often very difficult to obtain, the Board has, in effect, placed an onus upon the employees (once it is established that they have refused to work when work is scheduled) to come forward with a credible and convincing explanation for their conduct. Where such explanation is not forthcoming, or where forthcoming, is not credible and convincing when viewed in the light of all the circumstances surrounding the work stoppage, the Board will normally draw the inference that the employees have acted in concert and therefore illegally.

48. This approach to the drawing of inferences in the strike context can be seen in

Durcard Mechanical Contractors Ltd., [1971] OLRB Rep. Feb. 86 and *Hickeson-Langs*, [1974] OLRB Rep. May 281, the two cases referred to by counsel for the applicant which did not contain the element of a picket line clause.

49. In *Durcard*, the employees called no evidence. Since the evidence of the employer established that the employees had refused to perform work which they had been directed to perform and that "their refusal was for the same reason and was announced or indicated at the same time" the Board had no difficulty in concluding that the employees had engaged in a strike. Before so concluding, the Board stated:

"The employees who are bound by the provisions of a collective agreement are subject to the strictures of the collective agreement and have the advantages provided under the collective agreement. However, such employees are not bound by collective agreements between other unions and other employers and are accordingly not subject to the provisions of such agreements nor can they take advantage of provisions of collective agreements that are not binding upon them. Accordingly, even though the picket lines that were established by the other trade unions on the Elrond project may be lawful picket lines, the respondent's action of honouring such picket lines in order to support the demands of members of other trade unions is not a right given under The Labour Relations Act." (p.89)

50. In *Hickeson-Langs*, the Board found that the employees, in refusing to attend at the employer's premises and perform their normal work, had engaged in a strike, notwithstanding the argument of their counsel that they had absented themselves from work, not for economic reasons, but because of a fear of injury from the picket line. While the record in *Hickeson-Langs* is not extensive, it does show that the employees had, on occasion, crossed the picket line to work in the employer's warehouse. The record also discloses that the applicant met with groups of employees in an attempt to persuade them to return to work and that this meeting resulted in work being done at the warehouse, although not in the return to work of the employer's delivery operation. Moreover, it would appear that the employees did not give evidence before the Board. In rejecting the request of their counsel that an illegal strike declaration not be issued, the Board stated:

"The Board has in certain circumstances held that a refusal to work under conditions which are apprehended by employees to be unsafe, does not constitute a strike and counsel for the respondent urges the Board to make a similar finding in the present case. With the greatest of respect we cannot agree that fear of a picket line in the circumstances of the present case should be grounds for denying a declaration that a strike is unlawful. The employees in refusing to return to work knew they were in violation of the provision of the collective agreement that requires that there be no strike or lockouts during the term of that agreement."

51. These decisions indicate that the Board will not, when faced with an application for an illegal strike declaration, assume the posture of an ostrich and blind itself to the labour relations realities. Awareness of these realities, however, does not mean that the Board will impose on employees and unions a standard of proof which is impossible to satisfy.

52. There remains the question of whether the Board should view a refusal to work by employees who have a common respect for the integrity of a picket line as being in accordance with a "common understanding". While it can be argued that this view of common understanding is reflected to some extent in some of the cases which have been decided in the context of the common law torts (conspiracy to injure, interference with contractual relations, etc.), there is certainly not, in Ontario, any clear judicial consensus to that effect. In any event, that is not the approach which the Board has taken to the interpretation of section 1(1)(m). Nor is it the position of the majority of the arbitrators in this province who have held that the touchstone of the strike is that of concerted, as opposed to coincidental, activity on the part of the employees. (See *Brown and Beatty*, Canadian Labour Arbitration 9:2100.) The proposition that the principles or philosophy of a particular group of individuals can, if implemented on an individual basis, make actionable an otherwise lawful activity, without any evidence of an agreement, either tacit or express, between the individuals in question, is not, moreover, a sound theory upon which to base a statutory violation, especially one which entails the risk of criminal prosecutions.

VI

53. The effect of a provision in a collective agreement allowing employees to honour a picket line such as Article 4.02, must be analyzed in light of the considerations set out above. The question is, to what extent are such clauses valid in the face of a statute which prohibits all concerted refusals to work during the currency of a collective agreement.

54. In *Ellis Don Limited*, [1968] OLRB Rep. May 197, the first case in which the issue arose, the clause in question stated that the no-strike provision of the collective agreement "does not deny (the employees) the right to refuse to cross any legal picket line" and further that "the employer agrees that no action will be taken against the union or any employee for refusing to cross such legal picket lines". In refusing to grant the strike declaration sought by the employer, the Board stated:

"Assuming, but without deciding, that the applicant is correct, [that neither party had the right to negotiate such a clause into the collective agreement] we are nevertheless faced with a situation wherein the respondents must be presumed to have refused to cross the picket line on Monday, May 6th, with the knowledge that the applicant had in fact signed a document saying that it would not take any action against them in such circumstances. The Board's decisions make it quite clear that it has a discretion as to whether it will or will not issue a strike or lock-out declaration."

55. In *Pigott Construction Company Limited*, [1969] OLRB Rep. May 399 and *Belmont Plastering Company Limited*, [1970] OLRB Rep. Mar. 1459, two cases which did not involve "picket line" clauses, the Board held that clauses which provided respectively that where there was a disagreement arising out of a jurisdictional dispute "the union shall have the right to withdraw its members from the work site in question" and that where there was a failure on the part of the employer to make certain payments in respect of a welfare fund or monthly dues, "the union would forthwith terminate any agreement to which it may have entered..." embodied attempts by the parties to contract out of The Labour Relations Act. In *Pigott*, the Board stated:

"What is of greater significance, however, is the fact that the article flies squarely in the teeth of Section 54 and 55 of The Labour Relations Act. These sections set out unqualified prohibitions. The article appears to us to embody an attempt by the parties to negotiate themselves out of the provisions of The Labour Relations Act and to make a law to themselves outside its evident scope and intent. We do not think the parties are competent to enact private legislation which would permit that which The Labour Relations Act prohibits even though, at the same time, they give lip service to the provisions of the Act governing the content of collective agreements..."

In our opinion, the clause is invalid and cannot be countenanced as a defence to a charge involving allegations with respect to an illegal strike. It cannot make lawful that which the Statute states so clearly is unlawful."

In holding that the "invalid" articles could not be raised as a defence to an application for a declaration of an unlawful strike the Board, in *Pigott*, stated:

"It may, of course, be argued that Section 15.6 is intended solely to relieve the union against a claim for damages in the event of arbitration proceedings arising out of a withdrawal of its members from a work site in the circumstances set out in 15.6. This, however, does not warrant absolution insofar as its clear transgression against the provisions of The Labour Relations Act is concerned so as to make it available as a defence to an alleged violation of that Act when and if the need should arise..."

and in *Belmont*:

"The parties are co-signatories to a collective agreement which contains the invalid article 10(c)(5). These circumstances might well be viewed to be sufficiently exculpatory to persuade the Board to decline to grant consent to prosecute the respondent for calling or authorizing an unlawful strike on an initial application. A declaration such as the one sought in the present instance, is not punitive but rather informative in nature. This being the case the circumstances referred to immediately above have, in the present application, less significance than they might have had in an application for consent to prosecute the respondent."

56. In *Associated Freezers of Canada Limited*, [1972] OLRB Rep. May 445, the first case to expressly deal with the question of the legality of a picket line clause, the Board found that a clause which provided that "it shall not be a violation of (the) agreement... for the employees...to refuse to cross a legal picket line and perform work in any instance where the picket line had been authorized by the union picketing" did not "on the facts" appear to authorize the activity engaged in since the employees did not "refuse to cross the picket line" but rather chose, once at work, not to handle "hot" goods. However, the Board, in response to the argument of the union that a concerted refusal by employees to handle the goods in question did not constitute a strike, stated, relying on *Pigott* and *Belmont*:

"It appears that the parties to the collective agreement in the instant case have attempted to qualify the "no strike" provision contained in the collective agreement which is required by Section 36 of the Act. By so doing the parties have attempted to contract themselves out from under the express provisions of Section 36 of the Act."

57. In *Hutchinson Mechanical Installation Ltd.*, [1973] OLRB Rep. May 240, the Board, following *Freezers and Pigott*, rejected the argument of the respondent that a clause in the agreement which provided that "it shall not be a violation of the agreement if members of the union refuse to cross a sanctioned picket line ..." could make lawful a strike authorized by a union and its officers.

58. Finally in *King Paving & Materials Division of the Flintkote Company of Canada Limited*, [1976] OLRB Rep. June 291, a case which also involved Local 494 of the United Cement, Lime and Gypsum Workers, the Board, held that a provision of the collective agreement between *King Paving* (the applicant in that case) and Teamsters Local Union No. 879 (the respondent) which provided that the applicant would not require its employees to cross a legal picket line after being so advised by telegram was "in so far as [it] purported to create exceptions to the *Labour Relations Act* invalid and without effect". In *King Paving*, the members of Local 494 who were then on a legal strike against Nelson Crushed Stone (the applicant in the instant case) extended their picket line from the Nelson Quarry in Burlington, the site of the strike, to the Lincoln quarry in Niagara. This extended picket line was respected by the Nelson employees who were drivers, although it was not respected by the inside workers of the applicant at Lincoln who crossed the line and came to work. After finding that the conduct of the Teamster drivers in refusing to cross the picket line constituted an illegal strike and that Leonard Schultz, an official of the Teamsters, had counselled or procured or supported or encouraged an unlawful strike, the Board directed that:

- (a) The Teamsters Local Union No. 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, cease and desist from calling or authorizing or threatening to call or authorize an unlawful strike;
- (b) The respondent Leonard O. Schultz cease and desist from counselling or procuring or supporting or encouraging an unlawful strike; and
- (c) The respondent Leonard O. Schultz *inform the members of the Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in the employ of the applicant that they are at liberty to continue working for the applicant at its Lincoln quarry in the Regional Municipality of Niagara regardless of the existence of picket line maintained by members of Local Union No. 494 of the United Cement, Lime and Gypsum Workers International Union.*

(Emphasis added)

59. It was argued by counsel for the respondents that a provision which purports to

authorize a concerted refusal by employees to honour a legal picket line need not be viewed by the Board as an attempt to contract out of the mandatory "no strike" provision since employees who honour picket lines do not normally have a grievance with the picketed employer. This argument falls prey to the same misconception which underlay the position put forward in *Domglas* – that the prohibition against strikes required by section 36 is restricted to section 37 disputes, that is, disputes relating to the interpretation application and administration of the collective agreement. As the Board pointed out in *Domglas*, The Labour Relations Act treats any collective work stoppage as being, in essence, an economic weapon and restricts its use to a certain collective bargaining situation – the final stages of the negotiation and renewal of a collective agreement. To avoid disruption in production and to promote industrial relations harmony, all work stoppages occurring outside this limited period, whatever their underlying motive, are prohibited.

60. Counsel for the respondents also argued that clauses such as Article 4.02 are similar in function to work assignment provisions in that they merely limit the circumstances in which the employer may require its employees to perform work. Article 4.02, however, does not purport to relieve employees of their obligation to report for work when confronted with a legal picket line. It provides only that a refusal to cross in such circumstances will not constitute a breach of the Collective Agreement and will not give rise to discharge or discipline.

61. To conclude that Article 4.02 is distinguishable from those clauses which expressly restrict the right of the employer to require work is not, however, to suggest that the Board's conclusion would have been different had Article 4.02 provided, as did the clause in *King Paving*, that the employer would not "require" its employees to cross a legal picket line. While it is, strictly speaking, unnecessary to express any opinion on that question, it is difficult to see any difference in principle between a clause which provides that it will not be a violation of the collective agreement for employees to refuse to cross a legal picket line and a clause which provides that employees will not be so required. Neither clause can make lawful that which would otherwise be unlawful – that is, a concerted refusal on the part of employees to work when there is work scheduled.

62. The argument of the respondents that the parties can, by private agreement, authorize a concerted refusal by employees to work when there is work scheduled, if accepted, would seem to entail the further conclusion that The Labour Relations Act does not prohibit a concerted refusal by employees to work voluntary overtime, even where the refusal to work overtime is at the behest of the union and for the avowed purpose of bringing pressure to bear on the employer in connection with negotiations. That is the very kind of activity on the part of the employees which was found by the Board, in the *Harding Carpets* case, to constitute a "strike", irrespective of the language of the Collective Agreement. In so finding, the Board in *Harding* stated:

"Nevertheless, assuming that that were the case [that under the agreement between the parties each employee is free to work or refrain from working overtime as suits his purpose and inclinations] it is implicit in such a situation that each employee should be free to exercise his own discretion in that regard on his own initiative. A concerted refusal to work overtime at the behest of the union frustrates the provisions of the

agreement relating to overtime work, in that it constitutes a unilateral abrogation of those provisions..."

(Emphasis added)

(In this connection, see also *Weyerhaeuser Canada Ltd.*, [1976] 2 Canada LRBR 41 and *Otis Elevator Co. Ltd.*, [1976] 2 Canada LRBR 65, two recent British Columbia Board decisions which held that a union-sponsored ban on overtime could amount to a strike under the British Columbia Labour Code, even in circumstances where the performance of overtime work was voluntary under the collective agreement.)

63. Counsel's argument that the Board, by issuing an illegal strike declaration in this case, would be allowing the employer to renege on its agreement with the union and thus to recoup by litigation that which it has given up during negotiations assumes that the intention of the parties in drafting Article 4.02 was to authorize concerted, as opposed to individual, refusals to cross a legal picket line during the term of the Agreement. Without expressing any opinion on what the decision in this case might have been had it been found otherwise, the Board finds that Article 4.02 was not intended to authorize a concerted refusal by employees to refuse to cross a legal picket line. Indeed, the officials of the respondent trade union do not appear to have construed the Article in that light.

64. To conclude that clauses such as Article 4.02 cannot authorize a work stoppage which, in the absence of such a clause, would amount to a "strike" is not, however, to conclude that such clauses are of no legal effect. As the Board recognized in both *Pigott* and *Freezers*, such clauses, while invalid to the extent that they purport to contract out of The Labour Relations Act, may nevertheless limit the liability of employees and/or the union under the terms of a collective agreement. In addition, such clauses may, as the Board suggested in *Belmont*, be sufficiently exculpatory to persuade the Board to decline to grant consent to prosecute where the employees or the union, relying on such a clause, engage in a "strike". Whatever the precise extent of the "collective agreement" protection which such clauses may afford, such clauses can probably be expected to provide a defense to individual employees who may be discharged or disciplined as a result of their refusal, on an individual basis, to cross a legal picket line. (See in this regard *Brown and Beatty*, 9:2300.)

65. That picket line clauses are valid for this limited purpose was at least tacitly acknowledged by the employer in the instant case. Not only do its letters to the employees of September 16th and September 23rd contain no reference to discipline under the Collective Agreement, the warning contained in its letter of September 23rd (in the event of non-compliance with its back to work order) was restricted to the possibility of an application for consent to prosecute being brought.

66. Viewed in this light, the presence of Article 4.02 in the Collective Agreement is not irrelevant to the determination in this case. It is a factor which can properly be considered in determining whether or not the members of Local 494 were acting in concert in refusing to cross the Association's picket line.

67. It should be noted here that the evidence in *Freezers*, *Hutchinson* and *King Paving* left no doubt that the officials of the unions concerned had counselled the work stoppages. Thus, there was no question in any of those cases that the employees had acted in concert.

VII

68. This particular application must be examined in light of the legal framework set out above.

69. In this case, there has been a refusal by all but one of the employees bound by a collective agreement to cross a picket line and report for work as scheduled. This calls for an explanation from employees as to how such a situation could have occurred. In the absence of a credible and convincing explanation from employees in that regard, the Board will draw the inference that the employees were acting in concert.

70. By contrast with the respondents in the cases referred to by counsel for the applicant, the respondents in this case did not sit back and attempt to argue that the employer had not proved a strike. The respondents called seven witnesses, including all of the trade union officials who had been in any way implicated in the work stoppage. These witnesses delivered their evidence in a candid and straightforward manner and were not discredited or shaken under cross-examination.

71. The employees who testified all indicated that they made individual decisions not to cross the Association's picket line. Three reasons were offered in support of these decisions: a concern about safety, the presence of Article 4.02 in the Collective Agreement, and the principle of not crossing a picket line.

72. Dealing first with the reason of principle, the evidence is that all the employees who refused to cross the Association's picket line were union members, the one employee who did cross being a probationary employee who had not yet joined the union. It has already been stated that the aversion shared by members of the trade union movement to crossing a picket line cannot normally be relied upon as a defence to an application in respect of an unlawful strike. This is especially true where, as here, the refusal to attend at work has continued over an extended period of time.

73. With the exception of Mattocks, the Secretary Treasurer of Local 494, the principle of not crossing a picket line was not advanced by the employees who testified as the primary justification for their refusing to attend at work. A reason advanced by almost all of the employees who testified was that of safety. Counsel for the respondents suggested that the Board, in assessing the reasonableness of the employees' concern in this regard, might take judicial notice of conditions attending truckers' strikes. This the Board is not prepared to do. It would establish a most dangerous precedent for the practice of collective bargaining in this province if it were assumed that a truckers' picket line poses, in and of itself, a risk of bodily harm or damage to property.

74. In the instant case, the employees' concern about safety cannot be the overriding consideration. Apart from the camera incident, which appears to have been provoked, there was no evidence of any violence occurring on the picket line. The evidence is that the police were present at all material times and that the salaried staff were able to cross the picket line without incident. An apprehension of possible danger could not, by itself, have caused all but one of the bargaining unit employees to stay away from work for an extended period of time in the face of demands from their employer that they return.

75. The distinguishing feature of this case, as opposed to the other cases in which a concern for safety has been advanced as a justification for not crossing a picket line, is that here, by contrast for example with the situation in *Hickeson-Langs*, the employees have a clause in their collective agreement which appears to shield from discipline those who decide, on an individual basis, not to cross a legal picket line. It has been noted that the employer's letter dated September 16th and the letter which followed it, made no mention of Article 4.02 and, further, that neither letter contained any warning of disciplinary action in the event of non-compliance with the employer's back-to-work instructions. It is also of some significance that the employer did not bring this application until more than two weeks after the commencement of the work stoppage complained of.

76. The foregoing establishes that the employees have advanced a credible and convincing explanation for their conduct in this matter. Does this explanation stand up when viewed in the light of the circumstances surrounding the work stoppage?

77. Counsel for the applicant in this matter made no attempt to discredit the evidence of the respondents directly. What he did do was to ask the Board to look behind their evidence and find that things were not as the respondents testified. Counsel put it bluntly when he suggested that what occurred was really a well-orchestrated event with Batten as the conductor. In counsel's submission, when Batten was "wearing his Truckers' Association hat", he was really a Cement, Lime & Gypsum worker in disguise.

78. There can be no doubt that Batten placed himself in a delicate position when he decided, as the District Representative for Local 494, to negotiate with the applicant on behalf of the Truckers' Association. The Board is not prepared, however, to conclude that the members of Local 494 must be found to have acted in concert simply by reason of the fact that Batten was "wearing two hats". If Batten's involvement with the Truckers' Association is to be made the basis for a finding of an illegal strike, this finding must be supported by the evidence and must not be based on speculation.

79. There are two features of the evidence which could be said to support such a finding – the closeness of the membership meeting held by Local 494 to the commencement of the Association's strike and Batten's attendance on the picket line. A refusal by union members to cross a picket line, following so closely upon a general membership meeting might, in another case, give rise to an inference that the refusal was instigated by the union. However, in this case, the evidence is that Batten told the employees in attendance at the membership meeting that they were to make their own decisions as to whether to cross or not to cross the picket line and that the union had no right to instruct them one way or the other. On the basis of the testimony before it, the Board must conclude that these statements were made in a forthright manner and not in a way which suggested the opposite of what was being said. As for Batten's occasional attendance on the picket line, there was no evidence that he was on the line on the morning of September 15th or that he was seen by any of the members of Local 494 during the strike. The evidence is that the employees stayed away from the picket line after the morning of the 15th.

80. In sum, the evidence does not support the allegation that the refusal by the members of Local 494 to cross the Association's picket line was orchestrated by Batten.

81. In arriving at a decision in this matter, the Board has attached no significance to

the fact that the employees remained outside the applicant's quarry on the morning of September 15th. There was no evidence in this case as there was, for example, in *Wheelabrator*, that the employees congregated as a group before deciding not to cross the line. The evidence is that the employees waited outside the quarry for the specific purpose of collecting their pay; and that after receiving this pay, they left the quarry and did not return.

82. For the foregoing reasons, the Board is not prepared to draw the inference that the employees, in refusing to report for work, were acting in combination, or in concert, or in accordance with a common understanding within the meaning of section 1(1)(m) of The Labour Relations Act.

VIII

83. The Board's conclusions in this case may be summarized as follows:

(a) The legality of a refusal by employees to cross a picket line, whether legal or illegal, must be tested against the same statutory criteria as any other activity which results in a disruption of an employer's operation during the currency of a collective agreement, namely, whether the employees, in refusing to work, have acted in "combination or in concert or in accordance with a common understanding".

(b) Where a significant portion of the employees in a bargaining unit refuse, during the currency of a collective agreement, to cross a picket line where there is work scheduled, the Board will normally require a credible and convincing explanation from employees as to how such a situation could have occurred.

(c) Where such explanation is not forthcoming or, where forthcoming, is not credible and convincing when viewed in the light of all the circumstances surrounding the work stoppage, the Board will normally draw the inference that the employees have acted in concert and, therefore, illegally.

(d) To the extent that a picket line clause purports to authorize, during the term of a collective agreement, a concerted refusal by employees to work when there is work scheduled, it is invalid as contrary to The Labour Relations Act.

(e) However, to the extent that such a clause purports to insulate employees from disciplinary action for refusing, on an individual basis, to work in the circumstances there defined, it is not contrary to The Labour Relations Act and is a factor which may be considered by the Board in determining whether the work stoppage in question amounts to a "strike".

84. The Board finds that the evidence in this case does not support the allegation that the employees have engaged in a strike or that the officials of the union have supported, encouraged or counselled an unlawful strike.

85. The applicant's request for a declaration and a direction, pursuant to section 82 of The Labour Relations Act, is therefore denied.

1245-77-U The Lummus Company Canada Limited, (Applicant), v. Basil Ware, Vernon Watson, Frank Leslie, et al (See Schedule A attached hereto) and Omar Phillips, Wayne A. Aselton, Kelly J. Marlatt, et al (See Schedule B attached hereto), (Respondents).

Strike – S.123 – Effect of employees returning to work prior to application for a cease and desist direction – Whether because of pattern of unlawful conduct direction should issue.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members F. W. Murray and E. Boyer.

APPEARANCES: Harry Freedman, D. A. MacDonald, T. Irvine and G. K. Bell for the applicant; J. F. Kennedy and V. Watson for the respondent.

DECISION OF THE BOARD; November 3, 1977.

1. This is an application under section 123 of The Labour Relations Act seeking a declaration of unlawful strike and requesting the Board to issue a cease-and-desist order against the individual employees.

2. It is undisputed that on November 7, 1977 and November 8, 1977, when the acts complained of occurred, there was in effect a collective agreement between the applicant and International Union of Operating Engineers, Local 793 and that all of the respondents, except as hereafter noted, were then in the employ of the applicant and covered by said agreement. At the hearing it became evident that Basil Ware, Vernon Watson and Frank Leslie, named as respondents, were employed in the capacity of "general foreman" and as such were excluded from the operation of the collective agreement.

3. At the hearing we were informed that the mailed Notice of the Application (filed on November 8, 1977) and of the Hearing had not been received at all by some undefined number of respondents and in some cases had not been received by others until Saturday, November 12th. We were also told that in respect to one respondent along with four others to whom notice was given by telegram as well as by mail, that the mail was received on November 12th and as of the date of the hearing the telegraphed notice was still not received. In view of this, the agent of the respondents requested a one-month adjournment to permit adequate preparation. Counsel for the applicant informed the Board that in addition to the service of Notice by the Board, the applicant had, on November 8th, posted the Notice of Application on its premises in three separate locations, each of which was customarily used by the respondents, and that the respondents had returned to work on November 9, 1977.

4. The Board, because of its well-known antipathy to delay in matters of this kind, and the over-riding need to act promptly to preclude deterioration in the industrial relations of the parties, refused to grant an adjournment. The Board further ascertained that sixteen respondents were present in response to the Notice of Hearing and that this was adequate to permit the processing of the application for the purposes of determining whether or not an illegal strike had occurred. The Board decided that in view of the doubt raised about the receipt of Notice by the respondents not present (and noting that because of the November 11th holiday there was only effectively two days of mail delivery available in respect to the

mailed Notices), it would not proceed against respondents not present in respect to any cease-and-desist remedy which it might decide to issue.

5. It was established by evidence that on November 7, 1977 a sub-contractor on the site put into use a trenching machine known as a "ditch-witch", named by members of the I.B.E.W. union. The I.U.O.E. Local 793 employees were of the opinion that operation of this equipment should fall into the jurisdiction of the I.U.O.E. and accordingly, left their work stations without authorization between 12:30 p.m. and 1:30 p.m. On the following day, November 8th, 1977, all I.U.O.E. Local 793 members were scheduled for work and 176 out of 180 failed to report for work. We find that these actions of the respondents constituted a strike and that it was contrary to section 63(1) of the Act.

6. The Board's practice is not to exercise its discretion to make a declaration under section 123 of the Act where, at the time of the hearing, the employees have returned to work. The Board will, nonetheless, make a declaration under such circumstances where there is a past history of unlawful strikes and/or a reasonable apprehension of recurrence of such illegal activity.

7. In the present application it was established in evidence that since May 1, 1975 there were nineteen separate occasions on which all or some employees, covered by the I.U.O.E. collective agreement with the applicant, either walked off the job or failed to report for scheduled shifts, in concert. The Board obviously has no difficulty in concluding that this pattern of disregard for contractual and legal obligations is so blatant that the existence of a reasonable apprehension of a future recurrence is evident on its face.

8. The Board declares that the actions of those employees covered by the collective agreement between The Lummus Company Canada Limited and the International Union of Operating Engineers, Local 793, who walked off the job on November 7, 1977 and did not report for work on November 8, 1977, engaged in an unlawful strike in contravention of section 63(1) of The Labour Relations Act. The Board directs that:

Ted Ollmann,
Larry Lajoie,
Ken Cooper,
John Emmerton,
Gordon Tucsok,
Gerard Williams,
Leo Paquette,
Ronald W. McArthur,
William B. Mills,
Glenn A. McKenzie,
Larry Blythe,
O'Neil Beaulieu,
Henry Williams,
Roy Irwin,
Merrill Gottschalk, and
Glen Wardell

cease and desist for the term of the present collective agreement from participating in any

unlawful strike. The Board further directs that The Lummus Company Canada Limited shall cause to be posted on its premises, readily accessible to employees covered by the collective agreement between itself and the I.U.O.E., Local 793, a copy of the Board's declaration and order, in such manner as will bring it to the attention of all employees concerned.

9. In regard to those employees classified as "general foreman" and who participated in the November 7th and November 8th unlawful strike, the Board has no jurisdiction in the present application to deal with their activities. The Board is loathe to pass this by without comment, and must record itself as being strongly condemnatory of activities of this type by managerial employees.

0884-77-R; 1040-77-U International Union of Electrical, Radio and Machine Workers – AFL-CIO-CLC, (Applicant), v. Lorain Products (Canada) Ltd., (Respondent), v. Group of Employees, (Objectors); and The International Union of Electrical, Radio and Machine Workers, – AFL, CIO, CLC, (Complainant), v. Lorain Products (Canada) Ltd., (Respondent).

Certification – Whether employer misconduct supports certification without a representation vote pursuant to section 7a – Effect of employee expression of opposition to union made following employer's illegal conduct.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members W.F. Rutherford and W.H. Wightman.

APPEARANCES: S.T. Goudge, H. Haddaway and J. Smith for the applicant/complainant; L.D. Smith and J.A. MacArthur for the respondent; Michael P. O'Dea, David M. Palmer and Gordon L. Howarth for the objectors.

DECISION OF VICE-CHAIRMAN KEVIN M. BURKETT AND BOARD MEMBER W.F. RUTHERFORD; November 25, 1977.

1. The Board directs that the above application and complaint be and the same are hereby consolidated.

2. In a decision dated September 21, 1977 the Board found that not less than thirty-five per cent of the employees of the respondent in the voting constituency were members of the applicant, and accordingly directed the taking of a representation vote which was held on October 5, 1977. The union filed a section 79 complaint on September 30, 1977 alleging violation of sections 3, 56, 58 and 70(2) of the Act and at the same time asked the Board to certify it without a vote pursuant to section 7a of the Act because, it claimed, the effect of the alleged unfair labour practices committed by the employer was to make it unlikely that the true wishes of the employees would be ascertained by a secret ballot vote. In the face of these charges having been filed by the union on September 30, 1977, the Board directed that the boxes be sealed pending a determination in this matter. The vote, therefore, has already been taken but the ballot box has been sealed.

3. A group of employees who had not heretofore been made a party to the certification application sought to intervene in these proceedings. Their intervention was challenged by the trade union. The Board is of the view that the filing of a request under section 7a of the Act constitutes a new point of departure in the certification process. It is a point at which employees not previously involved in the proceedings are entitled to intervene and be heard. Accordingly, the Board ruled at the hearing that the employees were entitled to intervene, to be made a party for the duration of the process and to make their representations. The Board cautioned the intervening employees, however, that its determination of the Section 79 matter would be based upon an objective assessment of all the evidence before it relating to the alleged misconduct of the respondent employer, and not simply upon the claims of individual employees that they had not been unduly influenced. Such claims, following upon the alleged intimidation, coercion or undue influence, are of little probative value. Where there is clear evidence of intimidation or threats it is of little consequence if one or more employees testify that they were not intimidated. Indeed, the Board must recognize that this testimony itself may be influenced by or be the product of the employer's coercive conduct.

4. The alleged misconduct in the instant case occurred in the period September 20 – September 30, 1977, the period following the Board's decision directing the taking of a representation vote. During this period the Vice-President and General Manager of the respondent organization wrote four letters to the employees and made two speeches to the employee body during working hours with respect to the upcoming vote. The employees were a "captive audience" for the two speeches. The initial task which confronts the Board is to decide if the written and verbal comments of Mr. MacArthur, the Vice-President and General Manager, constitute "coercion, intimidation, threats, promises or undue influence" within the meaning of Section 56 of the Act or if his comments are within the bounds of freedom of expression which is protected by Section 56 of the Act.

5. Section 56 of the Act reads:

"No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

The line which separates freedom of expression from undue influence or the other prohibitions found in Section 56 of the Act is a thin one which must be drawn having regard to the facts of the particular case. There are, however, certain broad indicia which have been well set out in the *Dylex* case (*supra*) at paragraph 19:

"In seeking to establish where the line lies the Board starts with the presumption that employees recognize that employers generally are not in favour of having to deal with employees through a trade union, and that therefore it ought not to surprise them when their employer indicates that he would prefer it if they voted against a trade union. Fol-

lowing from this the Board takes the view that an invitation to employees from their employer to vote against a trade union, in the absence of any surrounding facts or circumstances which would cause the employees to place undue emphasis on such statements, does not constitute undue influence within the meaning of section 56. (See: *Playtex Limited*, [1972] OLRB Rep. Dec. 1027.) On the other hand, however, the Board is also cognizant that an employee may be peculiarly vulnerable to employer influences. This point is clearly brought out in the decision of the Canada Labour Relations Board in the *Taggart Service Limited* case [(1964) CLLR Transfer Binder '64-'66, ¶16,015 at page 13,055] the following excerpt from which was cited with approval by this Board in the leading case of *Bell & Howell Ltd.*, [1968] OLRB Rep. Oct. 695 at p. 706:

‘An employer may express his views and give facts in appropriate manner and circumstances on the issues involved in representation proceedings in so far as these directly affect him and has the right to make appropriate reply to propaganda directed against him in relation thereto. However he should bear in mind in so doing the force and weight which such expressions of views may have upon the minds of his employees and which derive from the nature and extent of his authority as employer over his employees with respect to their wages, working conditions and continuity of employment. He should take care that such expressions of views do not constitute and may not be reasonably construed by his employees to be an attempt by means of intimidation, threats, or other means of coercion to interfere with their freedoms to join a trade union of their choice or to otherwise select a bargaining agent of their own choice.’ ”

6. The Board has reviewed the comments of Mr. MacArthur and has satisfied itself that he exceeded the bounds of freedom of expression and violated Section 56 of the Act. The Board finds that Mr. MacArthur interfered in the selection of a trade union by exercising undue influence over his employees in the period immediately preceding the taking of the representation vote. The employer, who enjoys a recognized position of control over the job security and economic well-being of his employees, unduly influenced his employees by playing upon their economic dependence and threatening their job security and economic well-being. Mr. MacArthur skilfully juxtaposed his comments with respect to strikes, wages and benefits, customers, and job security such that an employee exposed to the employer's remarks would be unduly influenced.

7. The employer established his position of dominance and set the theme for his subsequent comments in the first letter of the employee body, dated September 20, wherein he stated:

“Your best interests lie with the company The company pays your wages and provides you with your benefit programs....”

The underlying thrust of the employer's message is brought home to the employees in the letter of September 28, 1977.

"... You must always consider the possibility of a financially crippling strike. Strikes are not a pleasant subject to consider, but they are a fact of life in unionized locations. We all know that where there are unions there are strikes and strikes are costly. Costly to the company in terms of a loss of business and possibly customers, and costly to you, the employee, in terms of lost wages which can never be regained.

Certainly you have a keen interest in both regards since a loss of customers affects your job security, and a loss of wages would affect your financial security.

Keep working toward job security, Don't place a 'third party' between yourself and the customer. Avoid this possibility and vote 'no' on October 5."

The employer's theme can be summarized as follows: Strikes are a "fact of life;" strikes mean loss of business and possibly customers; "customers affect your job security;" "don't place a third party between yourself and the customers;" avoid this possibility and vote "No." This theme which was followed by Mr. MacArthur throughout his remarks was made particularly relevant to the employees of Lorain by the clear message that in order to "maintain" their present level of benefits in negotiation with the company the employees would have to resort to strike.

"All of these benefits are and have been yours without the necessity of your paying costly dues, for these are benefits provided by your company.

As stated before, your benefits will become negotiable if the union wins the election. The outcome of any negotiations is difficult to predict; however, it is a fact that other Reliance locations which are presently represented by unions do not have benefit programs which are as comprehensive as the one which you *NOW* enjoy.

Consider your alternative carefully. Ensure that you **MAINTAIN** the present level of benefits for yourself and your family vote: No Union." (emphasis added.)

This threat is repeated by Mr. MacArthur in his "captive audience" speech of September 22 in which he reviewed in minute detail a manual of employee benefits which had been given to the employees on that same day and concluded as follows:

"I would like to remind you that the manual is good only so long as there is no union. The minute the union comes in, this book becomes void and each item becomes negotiable. *And there are items the company will take a strike on.*" (Emphasis added)

The threat was again delivered to the employees in the "captive audience speech of September 28:

"... and negotiations often go on for many months and could end up in a strike ...

We start bargaining as though we had no wage structure and as though the benefits did not exist. There is no law that says that we have to agree to a single particular demand made by the union."

The employer has drawn a direct relationship between strikes, customers and job security and has put his employees on notice that they will have to strike in order to "maintain" the existing level of benefits if they chose the trade union as their bargaining agent. In his speech on September 30, Mr. MacArthur returned to the theme of job security and implicitly threatened his employees in the following terms:

"As matters now stand – you have a job and steady employment here at Lorain. Naturally we hope things get even better. It can be better if you can get this union matter behind us and settle down to the business all of us are supposed to be here for."

8. The employer by playing upon his position of economic dominance, by skilfully juxtaposing his comments with respect to strike, wages and benefits, customers and job security, and by carefully mixing fact with threat has painted a picture of union representation which would involve his employees in a "Hobson's choice." If his employees decide in favour of collective representation the employer has made it clear that they will be required to either accept a loss of economic benefits or engage in a strike with consequent loss of job security. The actions of the employer constitute undue influence within the meaning of Section 56 of the Act and must be construed as an unlawful interference in the employee selection of a trade union. An employee is entitled to exercise his freedom of selection free from fears for his job security and/or economic well-being which have been threatened by the employer. The rationale in support of this conclusion is captured at paragraph 11 of the recently released *Viceroy Construction Company Limited* case, Board file No. 2155-76-R.

"The Act recognizes that an employer is in the more immediate position to affect an individual's employment relationship, if only by virtue of its freedom to advance, preserve, impede or terminate an individual's employment. Therefore, by the terms of the Act, that very freedom is restricted. In order to protect and promote the collective bargaining process the Legislature has provided that no employer is free to affect a person's job security or conditions of employment when the employer's action is prompted by an anti-union motive, (e.g. section 58 of the Act). For the same reason, by virtue of the Act, an employer's freedom of expression regarding possible union representation of his employees is not absolute. While he is of course free to express his view of representation by a trade union he may not use that freedom of expression to make overt or subtle threats or promises motivated by anti-union sentiment which go to the sensitive area of changes in conditions of employment or job security."

See also *Robin Hood Multi Foods Limited*, [1976] OLRB Rep. May 250 and *Ex-Cell-O Wilex (Canada)*, [1977] OLRB Rep. June 370.

9. The union has asked the Board to apply section 7a of the Act and certify it without regard to the vote which was conducted October 5, 1977. Section 7a of the Act provides.

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the employees in the bargaining unit."

There are three conditions which must exist before the Board may exercise its discretion under Section 7a of the Act. These are:

- (1) The employer has contravened the Act.
- (2) The contravention has resulted in a situation where the true wishes of the employees are not likely to be ascertained.
- (3) The trade union has membership support adequate for the purposes of collective bargaining.

10. The Board has found that the employer contravened the Act in his efforts to dissuade his employees from voting for the union. The first condition precedent to the application of Section 7a has been met. The Board is satisfied that in the circumstances of the instant case the second condition precedent to the application of Section 7a prevails. The result of the employer's wrongdoing has been to make it unlikely that the true wishes of the employees would have been ascertained in the representation vote which took place on October 5 or would be ascertained in any subsequent representation vote. The threat to job security and/or economic well-being cannot now be erased by either the employer or the Board. It undoubtedly followed the employees into the voting booth on October 5 and would follow the employees into the voting booth in any subsequent vote. The ability of any employee with normal concerns for his economic well-being and job security to express his true wishes with respect to union representation has been undermined by the "information" campaign conducted by the employer in the period September 20 - 30 inclusive.

11. The Board must now turn its attention to the question of whether the trade union has membership support adequate for the purposes of collective bargaining. A remedial authority similar to that now found in section 7a has been part of the Act for some years. Section 7(4), the immediate predecessor to section 7a provided:

"If the Board is satisfied that more than 50 per cent of the employees in the bargaining unit are members of the trade union and that the true wishes of the employees are not likely to be disclosed by a representation vote, the Board may certify the trade union as bargaining agent without taking a representation vote."

Section 7(4) could not be invoked unless the union had filed membership evidence on behalf

of at least fifty per cent of the employees in the bargaining unit and the true wishes of the employees were not likely to be ascertained. In introducing Section 7a in 1975 the legislature deleted both the requirement for majority support and the reference to the representation vote, and added the requirement that the alleged employer misconduct must amount to a violation of the Act. While in the opinion of the Board there must be membership support adequate for collective bargaining, there need be no specific percentage or majority. Indeed, since the Board must be satisfied that the true wishes of the employees are unlikely to be ascertained, it may be very difficult to find untainted evidence as to the union's support. In such circumstances the Board may have to rely heavily on the membership cards filed with the Board as required by the Act since those cards represent a voluntary and unequivocal expression of support for the union and for collective bargaining.

12. In this case the Board has before it signed evidence of membership submitted on behalf of more than 50% of the employees in the bargaining unit. This evidence, in the form of combination applications for membership and receipts acknowledging the required \$1 payment, was submitted prior to the unlawful interference by the employer. The Board also has before it two statements dated October 13, 1977, some eight days after the taking of the vote, which bear the signatures of 41 of the 62 bargaining unit employees. The preamble of these statements reads as follows:

“Messrs. Carrie and O’Dea,
Barristers and Solicitors,
555 Talbot Street,
St. Thomas, Ontario
N5P 1C5

The undersigned hereby retain you to act as our solicitors and authorize you to appear on our behalf before the Ontario Labour Relations Board in Toronto on October 20th, 1977, and there to make the following representations:

- (a) The results of a vote taken on the premises of Lorain Products (Canada) Ltd. on October 5th, 1977 to establish the International Union of Electrical, Radio and Machine Workers as our bargaining agent should stand.
- (b) We were not unduly influenced as a result of discussions with and letters received from management of Lorain Products (Canada) Ltd. concerning the application of the Union, nor were we in any way threatened, coerced or intimidated by management or anybody on its behalf.
- (c) The interests of the undersigned will not be best represented by the applicant Union.

The undersigned undertake to pay the fees and expenses of our solicitors properly incurred in carrying out the above instructions.”

union and who had paid the required \$1 subsequently signed the above statement in opposition to the union. The Board in weighing all of the evidence before it must assign a significantly greater weight to the evidence of membership submitted by the union. There is no allegation or evidence before the Board to suggest that the evidence of membership submitted by the union was acquired by other than lawful means. The statement in opposition to the union, however, follows closely upon the unlawful interference of the employer. The Board has found that the employer used undue influence in an effort to dissuade his employees from supporting the trade union. As a result the subsequent expression of opposition to the trade union (the response sought by the employer) by these same employees is of little probative value in assessing their true wishes. In the circumstances the Board must assign a considerably greater weight to the evidence of membership submitted by the union and find that as of the date hereof the applicant union has, in the opinion of the Board, membership support adequate for the purposes of collective bargaining. The third condition precedent to the application of Section 7a has been satisfied.

13. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER W.H. WIGHTMAN:

I dissent. My reasons therefor will be given at a later date.

0932-76-R; 0513-77-R Operative Plasterers and Cement Masons International Association of the United States and Canada Local Union No. 124, Ottawa, Hull, (Applicant), v. Zaph Construction Ltd., (Respondent), v. 1. Labourers' International Union of North America, Local 183 2. Labourers' International Union of North America, Local 527, (Interveners). Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 124, Ottawa-Hull, (Applicant), v. Zaph Construction Ltd., Elru Payroll Company Limited, Demiro Construction Limited and Sardina Investments Limited, (Respondents), v. Labourers' International Union of North America, Local 527, (Intervener).

Certification – Related Employer – Reconsideration – Collective Agreement – Whether on an application for certification Board will apply section 1(4) in order to raise a contract bar to the application – Whether such matters can be raised on reconsideration where union did not receive notice.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and E. Boyer.

APPEARANCES: Denis Power, Catherine McLean and Jean Guy Denis for the applicant; Gerald Yasskin and Tony Michael for the respondents; Raymond Koskie, L. Richmond, D. Manoni and L. Castaldo for the interveners.

DECISION OF THE BOARD; November 24, 1977.

1. The Board hereby amends the style of cause in Board File No. 0932-76-R to show the Labourers' International Union of North America, Locals 183 and 527 as interveners.
2. The Board directs that the above applications be and the same are hereby consolidated.
3. This is a request made by the Labourers' International Union of North America, Local 183 and Local 527 (hereinafter referred to as Local 183 and as Local 527) under section 95(1) of the Act for reconsideration of a Board decision dated September 1, 1976 in which the Board certified the International Brotherhood of Plasterers and Joiners Local 124 (hereinafter referred to as Local 124) as bargaining agent for a bargaining unit of cement masons in the employ of Zaph Construction Ltd. (hereinafter referred to as Zaph) in the Ottawa area (Board Area 15). Locals 183 and 527 have coupled a Section 1(4) application with the request for reconsideration. Neither Local 124 nor Zaph advised the Board of the possible interest of Locals 183 or 527 of the Labourers Union at the time of the filing of the application for certification and as a result Locals 183 and 527 were not served with notice and did not participate. Proper notice of the application for certification, however, was posted at the Zaph job site. Both locals claim that they should have been served with notice at the time of the application, that they moved immediately upon finding out that their rights had been affected and that the Board is obliged in the circumstances to give them status at this time and listen to their representations.
4. Local 527 is party to a collective agreement with Frankfurt Construction Co. which runs from May 1, 1975 to April 30, 1979 and covers, among others, all cement finishers in the employ of Frankfurt in the Ottawa area. It is the position of Local 527 that if it had been given notice of the application for certification by Local 124 in respect of the cement masons in the employ of Zaph, it would have appeared before the Board and claimed the same bargaining rights which the Board assigned to Local 124. It would have argued that its agreement with Frankfurt operated as a bar to the application in that Frankfurt and Zaph are related employers.
5. It is admitted that Zaph and Frankfurt are related employers and it is further admitted that from May, 1974 until the Plasterers and Zaph signed a collective agreement on February 2, 1977, that Zaph honoured the terms of the collective agreement between Frankfurt and Local 527 in respect of the cement finishers in its employ. During this period Local 527 received dues remittances by cheque bearing the name Zaph Construction Ltd. The dues remittances stopped on February 2, 1977 immediately upon Zaph and Local 124 entering into the collective agreement referred to above. Local 527 filed a grievance on February 10, 1977 under the terms of its agreement with Frankfurt seeking to have that agreement enforced in respect of the cement finishers in the employ of Zaph. The relief sought by Local 527 was the discharge of the cement finishers in the employ of Zaph on whose behalf dues were no longer being remitted to Local 527. Local 124 countered with a Section 79 complaint charging Local 527 with intimidation and coercion in violation of Section 61 of the Act. That complaint, which is also before this panel of the Board, has been put aside pending a determination in this matter. Local 527 and Local 183 in turn countered with the combined request for reconsideration and Section 1(4) application which are the subject matter

of the instant case. It is the contention of Local 527 that it moved to protect its rights as soon as it became aware that they were threatened.

6. Local 183 is a party to a collective agreement with Zaph which covers all cement finishers working "in and out of" the Toronto area (Board Area #8). It is the unrefuted contention of Local 183 that it had members working for Zaph in Ottawa at the time of the Plasterers' application for certification and that as a result it too should have been served with notice of the certification proceedings and is entitled at this time to request reconsideration of the Board's earlier decision. Local 183 presented a membership card dated prior to August 19, 1976 which was signed by one of the men working for Zaph in Ottawa at the time of the Plasterers' application for certification. Local 527 also presented a membership card dated prior to August 19, 1976 which was signed by one of the two persons on whose behalf the Plasterers sought and obtained bargaining rights by the decision of the Board dated September 1, 1976.

7. The Board must first decide if either or both Locals 183 and 527 have status to intervene in the original certification proceedings. If either or both are found to have status to intervene and request reconsideration, the Board must then decide if the merits of the intervention are such as to cause it to revoke its earlier decision. Turning firstly to the status of Locals 183 and 527 to intervene in the certification matter on the basis of their status as representatives of individual employees affected by the application. Both Locals 183 and 527 presented membership cards on behalf of employees who might have been affected by the original application. If either Local had intervened at the time of the processing of the initial application and presented cards signed by persons affected, they would have been afforded intervener status as representatives of persons directly affected. They did not seek to intervene in the original proceedings, however, and in the face of notice of the original proceedings having been posted, their attempted intervention at this time, on the basis of their status as representatives of individual employees, is untimely. The Board posted notices of the certification application in the work place so as all employees who may have been directly affected by the application would be aware of it. It is incumbent upon an employee who may be affected by an application for certification and who wishes to be represented by an agent, to notify his agent of the application and of the representations which he wishes made on his behalf. In circumstances where no bargaining rights are involved notice to the employee is notice to the union. A union which claims to represent one or two employees in a bargaining unit for which another union seeks bargaining rights must rely upon those it purports to represent to advise them of the proceedings. In this case all of the employees affected by the application were notified in accord with Section 6 of the Statutory Powers and Procedures Act and accordingly, the failure of Locals 183 and 527 to intervene in the original proceedings as representatives of individual employees precludes their intervention at this time as representatives of these employees.

8. In circumstances where a trade union's established bargaining rights (as distinct from the claim to represent individual employees) may be affected by an application for certification, that trade union is entitled to individual notice of the proceedings. A union, whose bargaining rights may be affected by an application for certification but who is not served with notice of the application, is entitled to move under Section 95(1) of the Act to protect its bargaining rights as long as it does so immediately upon becoming aware that its purported rights have been affected.

9. Local 527 was receiving dues remittances from Zaph on behalf of the same persons for whom Local 124 sought and received bargaining rights. Local 527 was a party to a collective agreement with Frankfurt, an employer whom the parties admit to be a related employer, the terms of which were honoured by Zaph during the period May 1, 1974 to February 2, 1977 in respect of the same persons for whom Local 124 sought and received bargaining rights. In the circumstances the Board is satisfied that it was incumbent upon Zaph to have notified the Board in its reply to the application that Local 527 may have an interest in the proceedings and that in turn it was incumbent upon the Board to have served Local 527 with notice of the application. Local 527 was not served with notice and as a result did not intervene in the certification proceedings. Local 527 was first affected by the Board's decision of September 1, 1976 when Zaph discontinued its dues remittances upon entering into the collective agreement with Local 124 on February 2, 1977. The Board is satisfied that Local 527 moved to protect its purported rights as soon as it became aware that they were in jeopardy and accordingly, the Board is obliged to afford Local 527 status to intervene and to request reconsideration of the Board's decision to certify Local 124 in respect of the cement masons in the employ of Zaph in the Ottawa area (Board Area # 15).

10. The bargaining rights of Local 183 which are relevant to this matter are those in respect of cement finishers and others in the employ of Zaph working "in and out of" the Toronto area (Board Area #8). Clearly those rights could not have been affected nor were they affected by the Board's decision to certify Local 124 on September 1, 1976. Local 183 represented those cement finishers employed by Zaph in Ottawa who were working out of Toronto at the time of the application. Local 183 continues to represent cement finishers in the employ of Zaph working out of Toronto. There was no reason for Zaph to notify the Board in its reply to the application that Local 183 may have had an interest in the proceedings and further there was no reason why the Board should have served Local 183 with individual notice of the proceedings. In the circumstances Local 183 is not entitled to intervene in these proceedings.

11. Whereas Local 183 has no status to intervene, Local 527, a trade union not served with notice of the original proceedings, whose purported bargaining rights were affected by the September 1976 decision of the Board, is entitled to be made a party and to request reconsideration under Section 95(1) of the Act. The Board is obliged to hear the representations of Local 527 and to be governed in its decision to reconsider by the merits of those representations as if they had been made at the time of the original proceedings. The passage of time subsequent to the filing of the original application for certification, which is in no way attributable to Local 527, is a factor which cannot be taken into consideration by the Board in assessing the merits of the request for reconsideration.

12. Local 527 relies upon the admission of all parties that Zaph and Frankfurt are related employers within the meaning of Section 1(4) of the Act. It is the position of Local 527 that in the circumstances its agreement with Frankfurt should serve as a bar to the application of Local 124 because, by the terms of its scope clause, it covers the same employees of the related employer as those for whom Local 124 sought and received bargaining rights. It must be noted at this point that related employers do not constitute one employer for purposes of the Act until the Board so determines. The Board has never issued such a declaration in respect of Zaph and Frankfurt.

13. Without addressing itself to the issue of whether the cement finishers and cement

2081-76-U, 0041-77-U, 0048-77-U The Ottawa Newspaper Guild, Local 205, and The Ottawa Typographical Union, Local 102, (Complainants), v. **The Journal Publishing Company of Ottawa Limited** and L.A. Lalonde, (Respondents); and The Ottawa Newspaper Guild, Local 205, and The Ottawa Typographical Union, Local 102, (Complainants), v. **The Journal Publishing Company of Ottawa Limited**, (Respondent); and **The Journal Publishing Company of Ottawa Limited**, (Complainant), v. The Ottawa Newspaper Guild, Local 205, and The Ottawa Typographical Union, Local 102, (Respondents).

Reconsideration – Duty to Bargain in Good Faith – Whether Board should reconsider its earlier remedial order in light of subsequent events.

BEFORE: Donald D. Carter, Chairman, and Board Members H.J.F. Ade and M.J. Fenwick.

APPEARANCES: Jeffrey Sack and Robert Rae for *The Ottawa Newspaper Guild, Local 205*, and *The Ottawa Typographical Union, Local 102*; C.A. Morley, H.A. Beresford and L.A. Lalonde for *The Journal Publishing Company of Ottawa Limited* and L.A. Lalonde; Stephen B. Smart for F.P. Publications Ltd. and David Perks.

DECISION OF D.D. CARTER, CHAIRMAN, AND BOARD MEMBER H.J.F. ADE; November 29, 1977.

1. This is an application requesting the Board to reconsider an earlier decision in this matter.

2. The Ottawa W.E.B. Newspaper Press Men's Union #62, The Ottawa Stereotypers and Electrotypers Union #50, and The Ottawa Mailers' Union #60, having reached a settlement with the Journal Publishing Company of Ottawa Limited (the Journal), informed the Board of their desire to withdraw all outstanding applications. These unions, therefore, will no longer be considered as parties to this reconsideration, and the style of cause is amended accordingly.

3. This application for reconsideration is in its second stage. Earlier, the Board, in a decision dated September 19, 1977, considered the general issue of whether the Board's discretion to reconsider a decision in which it had issued a bargaining order should be exercised on the basis of facts arising subsequent to that decision. It was held by the Board that "a party seeking reconsideration of a bargaining order on the basis of events occurring after the Board's decision must establish convincingly that subsequent events have altered substantially the bargaining situation so as to make the Board's initial order clearly inappropriate". A hearing was then held in order to determine if the events that followed the Board's bargaining order of June 20, 1977 met this test.

4. The bargaining order of June 20, 1977, based on our finding that the unions and the employer must both bear the responsibility for the breakdown of the earlier negotiations, directed the parties to apply for the services of a provincial mediator, to meet with

15. Local 527 was aware of the existence of Zaph from as early as May, 1974 at which time it commenced to receive dues remittances from Zaph. Local 527 knew at that time and during the intervening 27 months that the Board had never made a Section 1(4) decision in respect of Zaph and Frankfurt (thereby causing the two companies to be a single employer for purposes of the Act), it knew that it did not have a collective agreement with Zaph and it knew that it was not certified as bargaining agent for employees of Zaph. It did not seek to enter into an agreement with Zaph nor did it seek to be certified as bargaining agent for those in the employ of Zaph, (a relatively simple procedure in the construction industry) nor did it seek a Section 1(4) declaration. Instead Local 527 relies upon the fact that Zaph complied with the terms of its collective agreement with Frankfurt and that the two employers are admittedly related. It is a common practice within the construction industry, and indeed the Board takes judicial note of the fact, that in the construction industry companies often honour the terms of a collective agreement without being a signatory to the agreement. The Board has never held that such an arrangement confers bargaining rights upon the union that is a signatory to the agreement or that such an arrangement constitutes a bar to an application for certification by a second union. Zaph's compliance with the terms of the agreement between Local 527 and Frankfurt does not assist Local 527 in this case. Local 527 chose not to acquire the bargaining rights in respect of the employees of Zaph either by seeking certification, entering into a collective agreement with Zaph or by bringing a Section 1(4) application upon becoming aware of the existence of Zaph. Local 527 chose to leave the bargaining rights exposed for 27 months and, notwithstanding the compliance by Zaph with the terms of the union's collective agreement with Frankfurt, the Board is not prepared to exercise its discretion under Section 1(4) and thereby establish a contract bar in respect of bargaining rights which were left exposed. The Board declines to exercise its discretion under Section 1(4) of the Act and declare Zaph and Frankfurt to be one employer within the meaning of Section 1(4).

16. Having regard to all of the foregoing the Board hereby declines to revoke or amend its decision of September 1, 1976.

segments of the enterprise. It was also possible in situations where associated or related companies carried on a single enterprise that employees of the separate legal entities could be represented by different trade unions so as to cause the bargaining rights within the single enterprise to be unduly fragmented. An example of the type of situation where section 1(4) was applied is found in *Walters Lithographing Company Limited et al, [1971] OLRB Rep. 406.*"

The Board went on in paras. 17 and 18 to caution against the use of Section 1(4) in circumstances as are before the Board in the instant case. Paras 17 and 18 read as follows:

"17. It is obvious from the foregoing that where the Board is asked to apply Section 1(4) it is desirable that the section be applied where the situation is fresh, i.e., where there are no outstanding bargaining rights in order that some global determination be made. The result of applying Section 1(4) where inroads have been made by separate trade unions into an existing associated or related enterprise is unsatisfactory. Such an application of the section might result in amending or revoking existing bargaining rights and upset many rights, duties and obligations that may have been resolved through private negotiation to the point where they have found their way into existing collective agreements. An interesting example – interesting because it appears to involve companies which are said to be involved in this application, may be found in *Industrial-Mine Instalations Limited and I.M.I. Underground Contractors Limited [1971] OLRB Rep. 712.* In that case the applicant trade union contended that the two named respondents fell within the purview of Section 1(4) of The Labour Relations Act and in that situation the Board applied Section 1(4) and determined that the two companies be treated as one employer for the purposes of the Act. That is a situation where there were no outstanding bargaining rights.

18. Further, we do not think that Section 1(4) was intended to be used by one trade union as a bar to another trade union obtaining bargaining rights in a company where the first trade union held no existing bargaining rights whatsoever. Where the trade union is confronted with a situation raised by Section 1(4) it has an obligation to act promptly and where related or associated employers are desirous of obtaining the benefits of Section 1(4) they too must act promptly. If the parties choose to leave exposed bargaining rights in a multientity situation they do so at their peril and at the risk that another trade union may enter the situation and claim those exposed bargaining rights."(emphasis added)

This reasoning was cited with approval in *Hallaire and Sons Company Limited* case, [1974] OLRB Rep. July 457, *E.J. Wright Central Ltd.* case, [1973] OLRB Rep. March 176, *Elmont Construction Limited* case dated June 5, 1974 (Board File No. 4226-73-R). The Board is reluctant to use Section 1(4) to establish a contract bar in a situation where the party requesting it has not moved to acquire the rights in question. The Board's jurisprudence in this regard was a matter of record prior to the time Local 527 became aware of the existence of Zaph.

masons in the employ of Zaph are one and the same the Board has not been persuaded that it should revoke, amend or vary its decision of September 1, 1976. Section 1(4) of the Act reads:

"Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

The Board has decided that in the circumstances of this case it should not exercise its discretionary powers under Section 1(4) of the Act and declare that Zaph and Frankfurt are one employer for purposes of the Act.

14. The underlying purpose of the Section 1(4) provision is reviewed in the *Industrial Mine Installations Limited* case, [1972] OLRB Rep. Dec. 1029 wherein the Board stated:

"9. Section 1(4) is obviously contemplated to cure the mischief that results from being unable to properly define and tie down the employment relationship. In many situations where companies have a close relationship an employee may be shifted from one company to another so that his employment relationship, at any given period, is difficult to define in terms of one employer. So too, the number of employees employed by one of those companies at any given time may be impossible to ascertain.

10. Prior to the enactment of Section 1(4), where such situations existed, it was difficult to define the employment relationship and to determine the proper employer for certain purposes under the Act. For example, in certification proceedings it was necessary to determine the proper employer in order to determine whether the union had sufficient membership among the employees to be certified.

11. Also, in some situations where a union had been granted bargaining rights for the employees of one employer, the employees could be shifted to another associated or related employer with the result that the bargaining rights which had been earned by the trade union for the employees was lost.

12. So too, in the case where associated or related employers joined a common enterprise and used one work force, which was shifted and transferred from time to time, the certification with respect to one employer only was, in effect, a certification of a segment of the total enterprise, and could seriously impair the totality of the business operations by inhibiting the shifting of employees between union and non-union

that mediator, and to bargain in good faith and make every reasonable effort to conclude a collective agreement. There is no question that the parties applied for a mediator and met with that mediator following the Board's direction. The unions contend that, when negotiations resumed under the direction of the mediator, the Journal did not bargain in good faith and make every reasonable effort to reach a collective agreement. This conduct, according to the unions, demonstrated that the Board's general bargaining order was not effective, and justified the subsequent imposition of a more efficacious remedy.

5. The negotiations that followed the Board's direction began in early July. At the meetings, on July 7, 8, the Journal renewed the offers that it had made during the aborted April negotiations. The Ottawa Typographical Union (the O.T.U.) countered by making what it regarded as a major concession on the work jurisdiction issue, accepting the Journal's proposal with the exception of copy coming from outside the Journal. The Journal did not agree to this exception. Another unresolved issue discussed at these meetings was severance pay. The previous collective agreement between the Journal and the O.T.U. provided for severance pay calculated on the length of service. This benefit was not insignificant. Richard Wetherdon, an employee with fifteen years service, estimated that in his case the payment would be \$9,000. Approximately sixty-five of the locked-out O.T.U. members would not be returning to work under the Journal's April proposal, a proposal that contained no provision respecting severance pay. Given this situation, it is not surprising that severance pay became one of the major stumbling blocks to a settlement.

6. The Journal and representatives of the Ottawa Newspaper Guild (the Guild) also met in early July. Again, the Journal put forward its April proposal. At the meetings on July 13, 14, the Guild submitted its counter-proposal. The principal concern of the Guild at that time was the prospect of diminished support within its bargaining unit resulting from the fact that a number of its locked-out members had found work elsewhere and would not be returning to the Journal. The Guild, therefore, was proposing that the union security provision be extended to cover employees hired during the lock-out. Also in issue were the matters of premium pay and shift differential.

7. These negotiations made very little progress until early November. A meeting occurred between the Journal and the O.T.U. on September 12, and then again on October 18. At that latter meeting, the O.T.U. proposed that the locked-out members be given a preference for the jobs in the Guild bargaining unit that could not be filled by Guild members upon a return to work. For its part, the Journal undertook to forward to the O.T.U. updated proposals. These proposals, sent to the O.T.U. on October 26, 1977, were quite similar to the April proposal, the differences being some minor changes in language, a provision for a straight-time rate for Sundays in the event of a Sunday edition, and the abandonment of the claim for damages against the union. Then, on November 4, the parties (both unions and the Journal) met for face-to-face bargaining.

8. At that meeting, the two major unresolved issues – severance pay, and the hiring preference for O.T.U. members for jobs in the Guild bargaining units – were discussed. Other unresolved issues between the O.T.U. and the Journal were the O.T.U. pension plan, the exclusion of foremen from the O.T.U.'s bargaining unit, the right of the production manager and assistant production manager to perform the work of that bargaining unit, the payment of medical insurance for Quebec residents, and jurisdiction over maintenance work. Between the Guild and the Journal there remained unresolved the extent of the union

security provision, night differentials, and premium positions, and the scheduling of vacation and days-off. Certain concessions had been made by the Journal on some issues, but they were not regarded as significant by the two unions. By this point in the negotiations, the Journal had dropped its claim for damages, had offered to compensate Quebec residents to the extent of \$125.00 per year for medical insurance, had offered contract language on the exclusion of foremen and the performance of bargaining unit work by supervisors, had offered access to its own company pension plan to O.T.U. members employed at the Journal, and had offered contract language on the scheduling of vacations and days-off. The issues of premium pay and night differentials were issues that the Journal had indicated could be left to the mediator. The Journal, however, offered nothing in the way of severance pay, and refused to give O.T.U. members any preference for the Guild jobs, indicating only that any application from an O.T.U. member would be considered on its merits.

9. The bargaining posture of the Journal, according to counsel for the unions, was one that demonstrated the ineffectiveness of the Board's general bargaining order. Counsel argued that the Journal had interpreted this order as sanctioning an inflexible position. The essence of this argument was that the Journal had not made any real attempt to accommodate its differences with the unions, and was in fact continuing a pattern of bad faith bargaining. From these facts it followed, according to counsel, that the Board should now impose a more efficacious remedy. Counsel asked the Board to consider a number of remedies: 1) an order compelling the employer to reinstate its offer made just prior to lock-out; 2) an order requiring the Journal to accept the O.T.U. members for the Guild jobs; 3) the appointment of an officer to supervise further negotiations and to make on-the-spot determinations as to whether the parties were bargaining in good faith; 4) an order postponing the pending termination application in respect of the Guild unit in order to give the parties a further opportunity to bargain in good faith; 5) a direction providing a right to return to work analogous to that provided by section 64 of the *Labour Relations Act*.

10. The Board, in order to even consider altering a bargaining order, must be convinced that subsequent events have altered substantially the bargaining situation so as to make the Board's order clearly inappropriate. The evidence presented to us does not, in our view, meet this standard. There is no doubt that, after the Board's general bargaining order was issued, the negotiations proceeded with some difficulty, and the collective agreements were not concluded between the employer and the two unions. Neither of these factors, however, convince us that in this case the general remedial order was clearly inappropriate.

11. When that order was issued last June, the Board was fully aware that the collective bargaining relationship had been badly eroded by over eight months of economic conflict, conflict that had caused irreparable losses to the unions, the employer, and the employees. Our clear finding at that time was that the responsibility for the breakdown of negotiations, and the resulting economic conflict, had to be borne by both sides. Although that evidence revealed a breakdown in negotiations, it did not, in our opinion, demonstrate that there was any employer plot to destroy the unions nor any union plot to destroy the employer. None of the incidents that occurred after these findings causes us to revise this assessment of the evidence.

12. In view of the strained relationship that existed at the time the order was made, the difficulties encountered in the subsequent negotiations are not surprising. At that point, both sides had lost heavily as the result of the prolonged economic conflict, and it was ap-

parent to us that it would not be easy for the parties to compromise their differences. Despite the possibility that the general bargaining order might not produce collective agreements, we considered it to be the appropriate remedial response. The duty to bargain in good faith is administered by this Board in such a way as to improve and facilitate the practice and procedure of collective bargaining. This approach recognizes, however, that the results of collective bargaining are necessarily dictated by the relative economic strength of the bargaining parties. Although the Board should make every effort to restore a bargaining relationship and re-establish the dialogue between the parties to that relationship, it should not go so far as to redress any imbalance of bargaining power that might exist in a particular collective bargaining situation. The general bargaining order that was issued reflected a concern that we not adopt this latter role.

13. The remedies proposed by counsel for the unions are all remedies designed to redress what they regard as an unfavourable bargaining situation. An order directing the employer to table its proposal made before the lock-out would result indirectly in the Board imposing at least those terms upon the parties. The less drastic remedy of ordering the employer to give preference to O.T.U. members when filling the jobs in the Guild bargaining unit would suffer from the same defect. In both cases, the Board would be dictating specific terms for the collective agreement, terms that should be arrived at by operation of the collective bargaining process.

14. The insertion of one of the Board's officers into the dispute to supervise the bargaining, although a novel approach, has very little else to commend it. If the officer is to be used only in the role of mediator, then it is simply a duplication of the approach that we have already taken. On the other hand, if the officer is to assess the merits of the respective positions taken by the parties, there would be a substantial interference with the content of the negotiations – a remedial approach that we have already rejected.

15. A postponement of the pending termination application would also alter the present balance of bargaining power. One of the risks of economic conflict for trade unions is that support within the bargaining unit may erode with the passage of time, either as the result of members finding employment elsewhere or by the hiring of non-union replacements by the employer. Section 53(2) of the *Labour Relations Act* sets out the extent to which the trade union is protected from a termination application when bargaining for a renewal of the collective agreement. At the very least the trade union is protected for a period of twelve months from the date of the appointment of the conciliation officer or mediator, as provided for in sections 15 and 16 of the Act. Protection does not extend in perpetuity. There is a finite limit set out in this section in recognition of the fact that, during a strike or lock-out, support for a trade union diminishes with the passage of time. At some point, therefore, employee support for the incumbent bargaining agent may be tested and, if found to be inadequate, that bargaining agent is displaced. Economic conflict is not allowed to continue indefinitely where employee support for a bargaining agent has disappeared. The time periods set out in section 53(2) create a certain balance of bargaining power between the parties, and any extension of these periods by the Board would serve to alter this balance.

16. In rejecting this remedy, we are aware of the union's concern that there has not been adequate time to bargain after the Board's order. Parties must recognize, however, that the Board cannot turn back the clock. If negotiations have broken down as a result of a breach of section 14, then the party seeking remedial relief must bring the matter quickly to

the attention of the Board, or run the risk of the Board's remedial order being less efficacious. The Board should not be viewed as a court of last resort to be used when all other approaches fail.

17. A remedy analogous to section 64 would suffer from the same flaw as the postponement of the termination application. The circumstances in which employees engaging in a lawful strike are entitled to return to work are specified in this section. That these circumstances are spelled out with some precision is not surprising. A return to work, absent any settlement of the labour dispute, is obviously an event that influences the balance of bargaining power. If the Board were to enlarge this entitlement by extending it to the circumstances of this case, it would be further affecting the balance of bargaining power. In our view, such an extrapolation, even if within our general remedial power, would not be justified by any sound labour relations considerations.

16. Our finding is that the unions have not established that the events following that order have altered the bargaining situation so as to make the earlier order clearly inappropriate. The application for reconsideration is dismissed.

DECISION OF BOARD MEMBER M.J. FENWICK:

1. I dissent.

2. This is an application for reconsideration of our decision of June 20, 1977. In that decision, the Board found that at one time or another during the long and bitter dispute both parties had failed to bargain in good faith and make every reasonable effort to make a collective agreement. The Board found three, distinct instances where the employer had failed to bargain in good faith, and one in which the unions had done so.

In view of the apparent difficulty of fashioning an effective remedy, and the possibility that the parties could amicably work out their own problems with the assistance of a mediator, it seemed then that the appropriate Board response should be one of restraint. I agreed with this position, and was not prepared at that time to find that the employer was bent upon the destruction of the union.

3. We are now advised that the employer has maintained an inflexible and intransigent position on the principal items in dispute – despite substantial concessions by the trade unions. We are asked to infer that the employer has continued a pattern of bad faith bargaining, and has engaged in empty discussions without any *bona fide* intention to seek an agreement. It is alleged that the employer is actively seeking to destroy the union and induce the employees to abandon their bargaining rights. Unlike the majority of this Board, I am prepared to draw both of these inferences.

4. It was argued before us that "nothing has changed" and that therefore, in accordance with our usual practice under section 95 of the Act, we should not reconsider or vary our earlier decision. Since I am prepared to find that the employer has continued a pattern of bad faith bargaining – in derogation of its obligations under the Act and our remedial order – I see no reason why we should not reconsider and attempt to fashion a more effective remedy.

5. The legal aspect of this case involves the interpretation of section 14 of the Act. That section provides:

"14. The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement."

[emphasis added]

The human aspect of the case is much more easily comprehended, and is much more fundamental. The employer has introduced new equipment which will eliminate the jobs of a number of employees. Most of them have had years of continuous service. Faced with forced unemployment, they have sought, through collective bargaining, to protect their livelihood. They are asking their employer to recognize their years of service and give them a preference over recent employees hired during the strike. They are seeking severance pay. And what obligation does the employer have to these employees?

6. It was argued before us that however reasonable the employees' proposal may now be, this Board has no power to require an employer to accept it. It is said that section 14 does not require that the parties reach agreement, and section 79 does not give the Board the power to impose one. It will be observed, however, that section 14 *does* require a trade union an employer to "make every reasonable effort to make a collective agreement". Can an employer fulfill his obligation if he adopts a position which is patently *unreasonable* – that is, one which cannot be justified on the basis of a legitimate and demonstrable business interest?

The Act contemplates that the parties will pursue their own economic self-interest, but such pursuit cannot include an insistence on the destruction of the collective bargaining relationship itself. This is not a legitimate business objective. In my submission, an employer is not permitted to assert a bargaining position which is "inherently unreasonable", i.e., lacking any demonstrable business justification. This Board has held that the duty to bargain in good faith involves a "duty of rational discussion". How can there be a "rational discussion" if a party is permitted to advance an objectively unreasonable position?

7. This Board cannot impose its subjective notions of fair dealing upon the parties. But this does not mean that their bargaining positions are entirely unreviewable. In *Graphic Centre*, [1976] OLRB Rep. May 221, for example, the Board found that the tabling of a number of new demands at the "eleventh hour" was not *bona fide*, but an improper attempt to sabotage the bargaining, and avoid the obligation to recognize the union. A party may well be engaging in what the American commentators refer to as "surface bargaining" – that is, bargaining which a mere sham because there is no real intention to conclude an agreement. Unless we deal with the "surface bargaining" problem, we will be giving no substance to the section 14 obligation and setting a standard which is so low as to undermine its very purpose.

8. Since, in my view, the Board is entitled to look at the reasonableness of the parties' positions in order to decide whether they are "making every reasonable effort to

make a collective agreement", what are the facts here? The employer is refusing to make any concessions on the major issue in dispute. The unions have made a number of concessions. The employer refuses to accept the recommendations of a neutral Industrial Inquiry Commission. The employer's present offer is substantially inferior to that which it previously made. The employer is insisting that six employees formerly in the unit now be treated as foremen even though the evidence did not clearly indicate the extent of their managerial responsibilities and this would result in there being one foreman for every three employees in the department concerned. Of the eighty-five O.T.U. members now locked out, the employer is prepared to allow the return of only eighteen to the unit. There are thirty-five Guild members who have found work elsewhere and will not be returning to the Journal. Why cannot the sixty-one redundant O.T.U. members be given some preference and if they have the requisite ability be allowed to fill these jobs and displace those who have been employed in them for less than a year? Taken as a whole, I would find that the employer was engaging in "surface bargaining", has adopted an unreasonable position, and has not therefore made every reasonable effort to make a collective agreement as it is required to do so by section 14 of the Act. In 1975, the *Labour Relations Act* was amended so that good faith bargaining complaints could be brought to this Board, and the Board's remedial authority was expanded so that it could deal with violations of the Act. In my view, this is a legislative mandate for the Board to be both flexible and creative in fashioning remedies. If a bargaining order is ineffective, then we must make a stronger order. If we cannot do so without further amendments to the Act, then we may not be able to effectively deal with the "surface bargaining" problem. In any event, in my view, this Board has ample authority to make whatever order it considers appropriate to "rectify the [illegal] acts complained of". Accordingly, I would order that the employer:

- (a) pay severance pay to employees who do not return to jobs with the employer; and
 - (b) allow the locked-out employees to return to the Journal in jobs which they are reasonably capable of performing, without discrimination because of their participation in the industrial dispute.
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0045-77-R The Canadian Union of Public Employees, (Applicant), v. **Jewish Vocational Service of Metropolitan Toronto**, (Respondent).

Certification – Bargaining unit – Whether employees in proposed bargaining unit share a community of interest.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members E. Boyer and J. D. Bell.

APPEARANCES: Jack White, Jane Aronovitch and Corileen North for the applicant; C. E. Humphrey and M. Friedman for the respondent.

DECISION OF THE BOARD: November 8, 1977.

1. The name: "The Jewish Vocational Services" appearing in the style of cause of this application as the name of the respondent is amended to read: "Jewish Vocational Service of Metropolitan Toronto".

2. The applicant union has applied to be certified as the exclusive bargaining agent for all office, clerical and technical employees of the respondent in Toronto, save and except the executive director, associate director, secretary to the executive director, general office manager, supervisors and persons regularly employed for not more than twenty-four hours per week.

3. The respondent objects to this proposed bargaining unit on the grounds that no community of interests exists between the office and clerical workers, the technical workers and the professional workers who fall within the above broadly defined unit. The respondent asked the Board to find, therefore, that three separate bargaining units would be appropriate for collective bargaining, that is, one for office and clerical workers, one for technical workers and one for professional workers.

4. The respondent further contends that Ms. Jane Aronovitch, the project job search co-ordinator, should be excluded from the bargaining unit on the grounds that she is employed in a confidential capacity within the meaning of section 1(3)(b) of the Act.

5. The applicant union has further asked the Board to exclude Ms. B. Raibmon on the grounds that she exercises managerial functions within the meaning of section 1(3)(b) of the Act.

6. In response to the dispute over the list and composition of the bargaining unit, the Board appointed Mr. Stewart Netherton, Labour Relations Officer, to inquire into the question of the community of interests among the groups of employees characterized by the respondent as office and clerical, professional, and technical employees as well as the duties and responsibilities of Ms. J. Aronovitch and Ms. Raibmon. Pursuant to a request from the respondent, the Board convened a hearing for the parties to make representations with respect to the conclusions which the Board should draw from the Labour Relations Officer's report dated August 8, 1977.

7. We address, first, the bargaining unit issue and the respondent's allegation that because of a lack of community of interests the proposed single bargaining unit is not appropriate for collective bargaining.

8. In *Usarco Limited*, [1967] OLRB Rep. Sept. 526, the Board itemized the criteria used in determining whether a community of interests exist among a group of employees:

- a) the nature of the work performed,
- b) conditions of employment,
- c) skills of employees,
- d) administration,
- e) geographic circumstances, and

f) functional coherence and interdependence.

The relative weight to be given to each of these criteria in any given matter varies with the facts of the case.

9. The Jewish Vocational Service of Metropolitan Toronto (hereinafter referred to as J.V.S.) is engaged in a range of activities to assist individuals in finding employment, adjusting to employment, planning careers, overcoming handicaps in the work world and generally becoming independent individuals. To accomplish this end, J.V.S. employs a number of trained counsellors to work individually with the clients in an effort to resolve their problems. (The counsellors fall within what the respondent proposes as the professional unit.) For employment training, J.V.S. has a rehabilitation workshop where clients learn to assemble things like electric switches and books as well as a clerical training division where clients are instructed in office skills. (Employees who specifically deal with the job training and rehabilitation of the clients fall within what the respondent proposes as the unit of technical employees.) To carry on these operations, J.V.S. has its own office and clerical needs which are met by various employees. (Employees who perform this work fall within what the respondent proposes as the office and clerical unit.) The position of the respondent is that the nature of the work performed by persons in each of the areas described and the skills required of them to perform their work are sufficiently different to indicate that a community of interests among them does not exist. The respondent emphasizes as well that there is no interchangeability of employment between these three groups. If a vacancy occurs in one group, someone from one of the other groups would not be able to occupy the vacancy because specific training is required for each function.

10. Having regard to all the evidence, the Board is of the view that it is an over-simplification to speak of the office and clerical employees as three distinct entities operating in three isolated areas. The evidence shows that many of the functions performed by the three groups are overlapping and interdependent and that to the extent that they can be separated, members of each group still deal directly with the clients to a point where they can function on their own in the working world.

11. Mr. W. Burkins, for example (listed under the group of technical employees), is one of the line supervisors in the workshop. He testified that he teaches the clients who are placed by their counsellors in this workshop how to perform the work on the line and how to behave in an industrial setting. Both Mr. Burkins and Mr. Saul Goodman, the rehabilitation counsellor (listed under the group of professional employees), testified that they work very closely together and are in daily contact with one another. Mr. Burkins reports to Mr. Goodman on how well the clients are learning workshop skills, adapting to the work setting and behaving with others; together they devise the best approach to be taken with individual clients in the workshop.

12. Mr. Goodman testified that he also works very closely with the evaluators (listed under the group of technical employees), which include Mr. C. Druker in the workshop and Ms. B. Raibmon in clerical training. Mr. Goodman explained that when clients come to J.V.S. they go through an assessment period of between four to six weeks. During this assessment period the evaluators closely monitor the clients' work and may conduct some psychological and skill testing while on the job. At the end of the assessment period there is a conference to decide whether the client should continue in the rehabilitation programme

and if so, what kind of treatment programme he should undergo. At the assessment conference the evaluators bring the results of their skill tests and interpret the tests for the counsellors and others in attendance.

13. To further emphasize the interdependence between the two groups, Mr. Goodman testified that Ms. M. Lockwood, the clerical assessment aid (listed under the group of office and clerical employees), also attends the assessment conferences. Ms. Lockwood is Ms. Raibmon's assistant and the evidence shows that she as well gives tests to the clients who are performing clerical rehabilitative work and interprets these tests at the meeting. The evidence shows that she is directly responsible for training clients on the cash register and reports regularly to Mr. Goodman on how they are coping with the work.

14. Interdependence between the professional employees and the office and clerical employees is further shown through Mr. Goodman's testimony that Ms. A. Abramsky, the administrative aid (listed under the group of office and clerical employees), performs a highly therapeutic function in her capacity of giving financial advice to the clients. Financial upsets and setbacks can have a very disruptive effect on a person's rehabilitative progress; to the extent, therefore, that Ms. Abramsky helps clients overcome their immediate financial problems and works with them to arrange their financial affairs to avoid future problems, she assists the clients' rehabilitative process.

15. In summarizing the relationship between the counsellor, the line supervisor, the administrative aid, and the clerical assessment aid (which include persons from all three categories), Mr. Goodman stated that their functions are so interrelated that, in his opinion, each function is as important as the other in the overall process of the clients' rehabilitation. Mr. Goodman emphasized that it would be impossible for the counsellors to get clients ready for the working world without the assistance of persons classified as both technical workers and clerical workers.

16. While people in their respective groups may exercise different skills requiring different levels and kinds of training, the evidence supports the conclusion that members of each group work together as a team to rehabilitate the clients and that each member of the team performs a vital function in the rehabilitative process. In *Essex Health Association*, [1967] OLRB Rep. Nov. 716, the Board discussed the relationship between the two criteria of the skills of employees and their functional coherence and interdependence. At page 722 the Board said,

Academic attainment and the exercise of special skills are not sufficient in themselves to cause the Board to separate the persons who exercise special skills from bargaining units which include other employees. Of greater importance is the manner in which the skills are exercised. If the special skills are exercised in conjunction with persons in other classifications who exercise related skills or *as part of a team*, which includes other classifications, such interdependence is of greater importance than the mere nature of the skills. (emphasis added)

17. On the basis of all the evidence, therefore, the Board is satisfied that because of the interrelationship and interdependence of duties performed by persons within each of the three groups and the resulting team approach to rehabilitation, a community of interests ex-

ists between the office and clerical workers, the technical workers, and the professional workers and that, together, they form a unit appropriate for collective bargaining.

18. Turning to the status of Ms. Aronovitch, she is the co-ordinator of project job search for the respondent. Her immediate supervisor is Ms. Pearl Chudd, the supervisor of the placement centre, and her ultimate supervisor is Mr. Milton Friedman, the executive director of the respondent. The particular aspect of Ms. Aronovitch's job that has been highlighted by the respondent as being confidential and causing a conflict of interest is her duty to calculate the budget..

19. Ms. Aronovitch described her involvement with the preparation of the budget as follows: Each year she is normally asked by Mr. Friedman and Ms. Chudd to find out from the Department of Manpower and Immigration the range of percentage increase being allowed for their type of service. When Mr. Friedman and Ms. Chudd have decided on the precise percentage they'll apply for, Ms. Aronovitch computes the figures for the budget application. For example, if the decision had been made to apply for a ten per cent increase in the budget, she would add ten per cent to each of the categories on the budget and submit the budget to Manpower.

20. Persons are generally considered by the Board to be employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act when they are regularly involved in a material way with matters which, if disclosed, would adversely affect the interest of the employer. Both the degree of involvement and the extent of the confidential nature of the material dealt with are important considerations in determining whether an employee is excluded under section 1(3)(b) of the Act (see *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379).

21. The preparation of the budget occurs once a year. The total amount of time spent by Ms. Aronovitch in preparing the figures for the budget application is fractional when viewed against her total duties. The testimony of both Ms. Chudd and Ms. Aronovitch indicates that the percentage increase applied for is not particularly confidential and that the staff would generally know both what the employer had requested and what it actually received from Manpower. The evidence shows that the increase would be openly discussed and thus would become general knowledge.

22. The evidence further shows that although Ms. Aronovitch has direct knowledge of the amount of the percentage increase for the general category for salaries, she has no input into or knowledge of the actual distribution of this money among individual employees. Assuming a general increase for salaries of ten per cent, Ms. Chudd testified that an individual employee may receive an increase of anywhere from two to ten per cent. The decision respecting individual salary increases is made by Ms. Chudd and Mr. Friedman and Ms. Aronovitch has no access whatsoever to salary decisions relating to individual employees.

23. In view of the minimal amount of time spent by Ms. Aronovitch on the preparation of the budget, the open manner in which the amount of the requested percentage increase is dealt with by the people in question, as well as her lack of access to any salary information relating to specific employees, the Board is satisfied that her knowledge of the percentage increase requested or received would not adversely affect the employer and is not sufficiently confidential within the meaning of section 1(3)(b) to exclude her from collective bargaining under the Act.

24. The final issue raised by the parties is whether Ms. B. Raibmon exercises managerial functions within the meaning of section 1(3)(b) of the Act.

25. Ms. Raibmon is an evaluator and was classified on the employer's list as a technical employee. In describing her duties Ms. Raibmon testified that she both manages the office and trains, tests and evaluates clients in clerical rehabilitative work. At the time of the examination Ms. Raibmon had authority over her full-time assistant, Ms. M. Lockwood, and a summer helper, both of whom did clerical and clerical assessment work under her supervision.

26. The Act does not specify the criteria to be used in determining whether an individual exercises managerial functions within the meaning of section 1(3)(b) of the Act. The general guideline adopted by the Board, however, is that where an individual spends most of his time supervising the work of others, as is the case with Ms. Raibmon, that person may be found to be exercising managerial functions if the person has effective control and authority over the other persons. For example, if a person makes effective recommendations or serious recommendations that the evidence shows are usually acted upon, and these recommendations materially affect the conditions of employment of those supervised, the Board may well conclude that the person is exercising managerial functions.

27. Applying these principals to the facts at hand, the Board is satisfied that Ms. Raibmon exercises managerial functions within the meaning of section 1(3)(b) of the Act. Ms. Raibmon has full authority to schedule vacations and to resolve any conflicts that might arise over the scheduling. While Ms. Raibmon informs her supervisor of the schedule agreed upon, the evidence shows that this schedule has never been changed at the hands of her supervisor. As well, Ms. Raibmon has full authority to schedule the lunch hours and to grant a short leave of absence. The evidence further shows that Ms. Raibmon has irregular meetings with her supervisor to discuss matters arising with respect to her employees. The Board is satisfied that although the parties normally come to joint decisions as to what action should be taken concerning her employees, her recommendations are treated most seriously and could materially affect the employees' condition of employment. For example, in making the determination as to whether or not her assistant could replace her during a recent leave of absence, the evidence shows that the decision was a group decision with the individuals involved sharing information and reaching a joint conclusion. The Board is satisfied, however, that Ms. Raibmon's recommendation on the matter was vital and could have swayed the conclusion in one direction or the other. Finally, and perhaps most importantly, the evidence demonstrates that Ms. Raibmon has what the Board concludes to be effective veto power over the choice of who will work for her as an assistant.

28. On the basis of the above, the Board is satisfied that Ms. Raibmon exercises effective control and authority over the persons she supervises and accordingly exercises managerial functions within the meaning of section 1(3)(b) of the Act.

29. In conclusion, the Board finds, with respect to the bargaining unit, that all office and clerical, technical, and professional employees of the respondent in Toronto, save and except the executive director, associate director, secretary to the executive director, general office manager, supervisors, the bookkeeper and persons regularly employed for not more than twenty-four hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

30. For the purpose of clarity, the Board notes that Ms. Raibmon, an evaluator, does not fall within the bargaining unit and that Ms. Aronovitch, the project job search co-ordinator, does fall within the bargaining unit.

31. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on April 19, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

32. A certificate will issue to the applicant.

0371-77-U Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers, Local 230, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant), v. Giuseppe Alfano and Sons Ltd. carrying on business as **Ontario Paving**, (Respondent).

Section 79 – Effect of employer entering collective agreement with union other than the certified bargaining agent – Whether Board will order amendment to agreement.

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. D. Bell and M. J. Fenwick.

APPEARANCES: Harold F. Caley and Max McDavid for the complainant; Gerald Yasskin and Carmen Alfano for the respondent.

DECISION OF THE BOARD; November 15, 1977.

1. This is a complaint filed under section 79 of the Act alleging breaches of sections 56, 58, 59, 61, 63 and 70 by the respondent. After extensive hearings the parties advised the Board that a settlement was reached and requested that the Board enter the terms of their settlement as an endorsement on the record.

2. Having regard, therefore, to the agreement of the parties the Board finds that the complainant and respondent are bound by a written memorandum of settlement dated October 25, 1977 and filed with the Board. That agreement, its schedules and appendices are hereby incorporated, by reference, as part of this Order and shall be enforceable as such.

3. The parties have made a further request as to remedy which has given us cause for reflection.

4. The essence of the complaint was that the employer had refused to recognize the complainant as the exclusive bargaining agent of all truck drivers of the employer in Board Area 8, notwithstanding that it was granted those rights by a certificate of this Board on

September 7, 1976. By the terms of settlement of this complaint the employer now fully recognizes the union as exclusive bargaining agent of the truck drivers in question. That recognition is incorporated in a collective agreement that is a part of the terms of settlement.

5. A problem arises in that on May 6, 1977 the employer entered into a collective agreement purportedly recognizing the Labourer's International Union of North America, Local 183 as the exclusive bargaining agent of all of its employees, including truck drivers. That, of course, it could not lawfully do, at least insofar as the agreement sought to include its truck drivers. Section 59(1) of the Act provides:

59.-(1) No employer, employers' organization or person acting on behalf of an employer or an employers' organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

6. The parties now ask this Board to use its remedial power under section 79 of the Act to amend the collective agreement between the employer and Labourers' Local 183 so as to expressly exclude from its operation the truck drivers represented by the complainant union. It may be noted in this regard that although it did not appear, Local 183 had notice of these proceedings and is therefore a party to them. (See section 1(1)(b) of the Board's Rules of Procedure).

7. There can be little doubt that the Board's remedial powers are broad and may, where appropriate, be exercised notwithstanding what may be contained in a collective agreement:

79(4) Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or

(c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.

8. This remedial jurisdiction appears to be sufficiently wide so as to permit the Board to issue an order that would have the effect of overriding the express terms of a collective agreement. (See e.g. *Leonard Murphy* [1977] OLRB Rep. Mar. 146). From a labour relations standpoint, however, it is preferable that parties should be given the first opportunity of removing any inconsistencies between their contract and the provisions of The Labour Relations Act. The involvement of the parties in that exercise is more in keeping with the overall scheme of the Act, grounded as it is in the promotion of the resolution of differences between employers and trade unions by communication and joint action. Moreover, it avoids the possibility of the imposition of an ill-advised choice of words upon parties. They are best qualified to draft the terms that will best serve their mutual interests.

9. In the instant case we find that the collective agreement between the employer and the Labourer's International Union of North America, Local 183, is contrary to section 59 of the Labour Relations Act insofar as it purports to apply to truck drivers employed by the respondent. It is, to that extent, and to that extent only, null and void. We have no reason to doubt that the parties to that agreement will forthwith make an amendment to it consistent with this finding, in order to clear up any doubt as to its application in the minds of the employees affected. We are not persuaded that it is necessary to make an order at this time.

10. The Board shall, however, remain seized of this complaint in the event that the employer and Local 183 should be unable or unwilling to effect an amendment reflecting the above finding, in which case an order will issue.

2098-76-U Roger St. George, (Complainant), v. Lumber and Sawmill Workers' Union, Local 2693, (Respondent), v. E. B. Eddy Forest Products Ltd., (Intervener).

Duty of Fair Representation – S.79 – Whether union settlement of employee grievance constitutes breach of its statutory duty

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: Wilf Peel and Roger St. George for the complainant; L. C. Arnold and Claude Seguin for the respondent; Francis Donnelly for the intervener.

DECISION OF THE BOARD; November 3, 1977.

1. The complainant, Mr. Roger St. George, alleges that he has been dealt with by the respondent union, the Lumber and Sawmill Workers' Union, Local 2693, contrary to the provisions of section 60 of *The Labour Relations Act* which reads as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

2. Mr. St. George has been employed by the intervener, E. B. Eddy Forest Products Ltd., since June 2, 1973. Prior to the matter in question, Mr. St. George had been disciplined by the company five times. Mr. St. George insists that in most of these instances he was not in the wrong. Whether Mr. St. George was innocent in the incidents registered on his record, however, is not as significant in the resolution of this matter as the fact that the record existed, whether rightly or wrongly, and that both the company and Mr. Seguin had it before them.

3. The incident which touched off the chain of events giving rise to this complaint occurred on Tuesday, November 23, 1976. Mr. St. George was engaged in hauling logs; on the last loading of the day he had positioned his truck on a hill. While the loader operator, Mr. Blanchette, turned to pick up the third of five grapples, the truck rolled about 25-30 feet down the hill.

4. Conflicts in evidence surround the question of whether Mr. St. George violated the company's safety rules which stipulate that no one may enter the cab of a truck while the truck is being loaded. Mr. St. George maintains that as soon as he saw the truck starting to roll, he jumped into the cab, hit the brake with his hand and stopped the truck. In his view, therefore, he saved the truck from serious damage. The company's view of the incident is that Mr. St. George contravened the safety rules and endangered lives. They maintain that he was in the cab when the truck was being loaded and mistakenly released the brakes.

5. The morning following this incident Mr. Desjardins, the transport supervisor, gave Mr. St. George an indefinite suspension, a suspension pending investigation. It is the union's handling of this suspension which forms the substance of this complaint.

6. After receiving the suspension Mr. St. George went directly to Mr. Claude Seguin, the area representative of the union, for advice. The parties agree that the following exchange took place: that Mr. St. George recounted his side of the story to Mr. Seguin, that Mr. Seguin asked him to write out a statement of what happened, and that Mr. Seguin indicated that before he would file a grievance for Mr. St. George he wanted to get the stories from both Mr. Desjardins and Mr. Blanchette and talk to Mr. Gus Fuller, the area superintendent. The evidence shows that Mr. St. George consented to this mode of procedure.

7. The next morning, Mr. St. George pressed Mr. Seguin to file the grievance before it was too late. Mr. Seguin agreed to write out the grievance but emphasized that he didn't want to file it until he could speak to Mr. Fuller to see if he could arrange a meeting with the

company which might negate the need for a grievance. Mr. St. George once again confirms that he gave Mr. Seguin his approval for proceeding in this manner. After speaking to both Mr. Desjardins and Mr. Blanchette, Mr. Seguin was apprised of three different versions of what had happened on November 23rd. Because of the fundamental variations between the stories, Mr. Fuller agreed to have a meeting with the union.

8. The conflict over the union's handling of Mr. St. George's suspension begins with the arrangements for the meeting with the company. Mr. Seguin testified that he encouraged Mr. St. George to attend the meeting but that Mr. St. George was reluctant to go because he didn't want to travel 300 miles when the meeting might not settle the matter. Mr. Seguin testified that in response to Mr. St. George's question as to whether it was necessary for him to be at the meeting, he told Mr. St. George that his presence was desirable but not mandatory. Mr. Seguin did not push Mr. St. George to come to the meeting but insisted that he wait by the phone during the morning of the meeting so that Mr. Seguin could get in touch with him either during or immediately following the meeting.

9. Mr. St. George's recollection of the arrangements is somewhat different. He testified that Mr. Seguin discouraged him from going to the meeting by telling him that his presence wouldn't be necessary because he knew the story. In cross-examination, however, Mr. St. George agreed with the suggestion that if he had wanted to go to the meeting he could have. He added, though, that he felt that even if he had gone he probably wouldn't have been brought into the meeting.

10. The union's meeting with the company to discuss Mr. St. George's suspension took place on December 1, 1976 and included Mr. Fuller, Mr. Desjardins and Mr. Seguin. Mr. Blanchette was asked to attend by both Mr. Seguin and Mr. Desjardins but declined. In his argument, Mr. St. George's representative asked the Board to find that the testimony of the three persons attending the meeting was too contradictory to be given any weight. The Board cannot agree with this characterization of the evidence. While there may be some differences in content and emphasis, the three accounts are entirely consistent.

11. In recalling what happened at this meeting, Mr. Seguin testified that Mr. Fuller opened it by stating that while the company had originally maintained that Mr. St. George should be discharged it was now willing to recall Mr. St. George for a job that would not involve operating machines. To justify the severity of this discipline, the company discussed Mr. St. George's record and Mr. Desjardins expressed the opinion that Mr. St. George had already had innumerable chances. Mr. Seguin testified that he refused to accept this recommendation because the company was on the verge of a lay-off and for the type of work being proposed, Mr. St. George wouldn't have been recalled until the spring. Instead, Mr. Seguin suggested that they work out a suspension, but emphasized that Mr. St. George would have to have the last say on its acceptability. When the company suggested an eight-day suspension, Mr. Seguin countered with a five-day suspension. On the understanding that if Mr. St. George agreed to this settlement the case would be close, the company agreed to make the offer of a five-day suspension.

12. Conflicting evidence surrounds the phone conversation between Mr. St. George and Mr. Seguin following the meeting. Mr. St. George contends that he never accepted the suspension and Mr. Seguin maintains that Mr. St. George not only accepted it but did so in full awareness of the fact that acceptance would constitute a final settlement of the matter.

13. In testifying about the phone call, Mr. Seguin stated that he related to Mr. St. George the process by which he and the company had come to settle on the offer of a five-day suspension. Mr. Seguin told the Board that when Mr. St. George asked him for his opinion of the offer, he made it clear to Mr. St. George that he would have to be the one to make the final decision but that in view of his record and the conflicting accounts of the incident, he felt he would be gambling if he went to arbitration. Mr. St. George asked for time to think it over and talk to his wife. Upon returning his call, Mr. St. George again asked Mr. Seguin for his advice and Mr. Seguin once again explained that Mr. St. George would have to be the one to make the final decision. Mr. Seguin testified that Mr. St. George specifically asked him whether he could re-open the case if he accepted the suspension and that Mr. Seguin replied with an uncategorical "no". By Mr. Seguin's account, Mr. St. George then said "okay, I guess I'll take that", and asked Mr. Seguin to request for him an immediate three-day leave because of a snow storm. Mr. Seguin stated that following this phone call there was no question in his mind that Mr. St. George had accepted the company's offer and that the matter was at an end.

14. Mr. St. George's account is somewhat different. He testified that when Mr. Seguin told him of the company's decision to give him a five-day suspension and that he could return to work that night, he said "okay, I'll see if I can make it up". Mr. St. George then called Mr. Seguin right back to ask if he had filed his grievance. Mr. Seguin explained that he hadn't because the case was now closed. By Mr. St. George's account he then requested a three-day leave because of the snow storm. Mr. St. George confirmed that when Mr. Seguin stated that the leave of absence request was a personal matter unrelated to the suspension, he told Mr. Seguin to call him back collect with the company's answer. During the return call, Mr. St. George told Mr. Seguin that he was going to look into the situation when he returned to Ramsey (presumably, that he was going to look into the possibility of filing a grievance). On cross-examination, Mr. St. George could recall no detail related by Mr. Seguin concerning the steps the company went through at the meeting to reach the decision of a five-day suspension. He recalled no conversation relating to his chances at an arbitration hearing, nor could he recall requesting time to think it over or saying that he wanted to talk to his wife.

15. When Mr. St. George returned to work he made repeated requests of Mr. Seguin to file a grievance for him. Mr. Seguin denied each request explaining that as far as he was concerned the matter was closed.

16. On an issue unrelated to the suspension, Mr. St. George complained that, contrary to section 60, Mr. Seguin had denied him a copy of their collective agreement. Mr. St. George testified that he once asked Mr. Seguin for a copy of the new collective agreement and that Mr. Seguin declined to give him one because at the time he only had one with him. Although he promised that the next time he came to Camp he would bring a copy for Mr. St. George, apparently he never did.

17. Before determining whether, on the above facts, the union had contravened its duty of fair representation, we comment on the argument of Mr. St. George's representative that the legal burden in section 60 should be placed on the union rather than the complainant. The burden of proof is normally on the party seeking to assert a proposition or fact that is not self evident. In its administration of section 60 of the Act the Board has adopted this basic principle and places the burden on the employee to establish that the union has vio-

lated its duty of fair representation. (See *Rutherford's Dairy Limited*, [1972] OLRB Rep. Mar. 240 and *United Steelworkers of America, Local 7608*, [1973] OLRB Rep. April 184). In light of standard burden placement principles and the Board's long standing practice, a legislative amendment such as that contained in section 79(4a) of the Act would be required to shift the burden of proof to the union in a section 60 complaint.

18. We turn now to decide whether the union, through its officer, Mr. Seguin, has acted in a manner that is either arbitrary, discriminatory or in bad faith.

19. The Board has held repeatedly that for a union to live up to its duty of fair representation by not acting in an arbitrary manner, it must address its mind to the merits of the grievance and act on the available evidence.

20. By Mr. St. George's account, Mr. Seguin asked him for a written statement of what happened. Mr. Seguin then obtained the stories from Mr. Desjardins and Mr. Blanchette. When he realized there were conflicting stories, he asked for a meeting with the company, which was granted. By all accounts of those at the meeting, Mr. Seguin rejected two company offers of settlement before finally agreeing to the company's offer of a five-day suspension. In view of Mr. St. George's record as well as the company's negative attitude towards him, the settlement engineered by Mr. Seguin appears to the Board to be more than reasonable. The Board accepts Mr. Seguin's assertion that in accepting the five-day suspension, subject to Mr. St. George's approval, Mr. Seguin assessed the stories before him as well as Mr. St. George's record and concluded that his chances at arbitration were not particularly good. The evidence overwhelmingly supports the conclusion that Mr. Seguin addressed his mind to the merits of the complaint and acted on the evidence available to him. In this regard, then, we find that he did not act in an arbitrary manner in recommending a five-day suspension to Mr. St. George.

21. Mr. St. George's representative further contends that Mr. Seguin's repeated refusal to file the grievance after the company meeting was arbitrary because Mr. St. George never accepted the company's settlement offer and he never intended to give up his right to file a grievance.

22. In evaluating the two versions of the post meeting phone conversation (through which Mr. Seguin contends and Mr. St. George denies that Mr. St. George accepted the five-day suspension in full settlement of the matter), the Board suspects that the conflict may have resulted, in part, from a misunderstanding. Mr. St. George's own account of the phone conversation is that he said he would take the five-day suspension. His position is, however, that in doing so he did not agree to relinquish his drive to grieve his suspension. Perhaps when he said that he would "take it", he meant he would accept it until he could actually grieve. The possibility of Mr. St. George's failure to appreciate the full impact of Mr. Seguin's statements about the finality of an acceptance is consistent with the Board's observations of Mr. St. George. As well, the Board entertains some doubt as to the accuracy with which he is able to recall events almost a year old. At intervals through his testimony the accuracy of Mr. St. George's memory was brought into question. Mr. Seguin's recall, on the other hand, was largely unshaken. In this particular telephone exchange, for example, Mr. St. George's recollection of what was said reflects a phone conversation of less than three minutes. Mr. Seguin's version, on the other hand, would have spanned a considerably longer period of time. The telephone bill shows that the initial telephone call took fourteen

minutes. When confronted with what might have been said in the fourteen minutes, Mr. St. George suddenly recalled he was in the bathroom at the time and had to keep Mr. Seguin waiting on the phone, an explanation which the Board simply does not believe. Based on the Board's evaluation of the witnesses, therefore, coupled with the objective evidence of the phone bill, the Board accepts Mr. Seguin's version of the phone conversation following the union's meeting with the company.

23. Even if the Board were to accept Mr. St. George's view of what transpired, however, the Board further accepts that Mr. Seguin was convinced, and reasonably so, that Mr. St. George had agreed to accept the suspension in full awareness of the condition that acceptance would end the matter for all purposes. Accepting that Mr. Seguin's interpretation of Mr. St. George's response was at least reasonable, if not accurate, the Board finds that his subsequent refusal to file a grievance was far from arbitrary but was based on his reasonable interpretation of what had transpired and on his reasonable concern for maintaining credibility with the company.

24. Apart from his failure to file a grievance, Mr. St. George's representative alleged that Mr. Seguin violated his duty of fair representation by not insisting that Mr. St. George attend the December 1st meeting. For support he cites the Board's decision in *Joseph Pap*, [1974] OLRB Rep. Jan. 60. In this decision the Board ruled that the union had violated its duty of fair representation by failing to advise either Mr. Pap or his lawyer that it was going to discuss Mr. Pap's grievance at its monthly meeting. In its reasons for decision, the Board made it clear that it was not seeking to regulate the internal administration of a union. Instead, it was insisting that once a union had adopted a procedure to follow (in this case the procedure of referring to monthly meetings the determination of whether or not a grievance should go to arbitration), it must act within the limits of the adopted procedure. The Board concluded that the union's failure to inform Mr. Pap of the meeting was discriminatory, if not arbitrary, because it violated its own procedure of providing a democratic forum for the determination of grievances.

25. The facts of the instant case differ fundamentally from the *Pap* case. Mr. St. George admits that Mr. Seguin informed him of the meeting. He agreed that he could have gone to the meeting if he had wanted to. As well, there is no evidence to show that in proceeding with the settlement meeting in Mr. St. George's absence, the union was violating a procedure it had established for itself in these matters. The *Pap* case, therefore, offers no support for Mr. St. George's claim.

26. Quite apart from distinguishing the *Pap* case, however, we do not agree that Mr. Seguin had an obligation to convince Mr. St. George to attend the meeting. The Board accepts Mr. Seguin's evidence that he not only informed Mr. St. George of the meeting but also asked him to go. Mr. St. George's testimony reflects the attitude of a tired man who had lost hope; he was reluctant to attend the meeting because of the distance and because he didn't think it would do any good. Mr. St. George agreed that when it became clear that he was not going to attend the meeting (for whatever reason), Mr. Seguin told him to stand by the phone so that he could be reached immediately following the meeting. The Board is satisfied that Mr. Seguin acted fairly and reasonably by first asking Mr. St. George to attend the meeting and by then providing the second best alternative of waiting by the phone. It was not necessary to compel Mr. St. George to attend.

27. Mr. St. George's representative further alleges that Mr. Seguin acted in a discriminatory manner, firstly, by making Mr. St. George pay for the phone call to respond to his request for a three-day leave of absence and secondly, by not providing Mr. St. George with a collective agreement. The prohibition against a union acting in a manner that is discriminatory is intended to prevent a union from distinguishing among members in the bargaining unit unless there are cogent reasons for doing so. Like situations ought to be treated in a like manner; neither favour nor disfavour should befall any individual apart from the others unless the circumstances so justify.

28. Did Mr. Seguin unfairly distinguish Mr. St. George either by calling Mr. St. George collect or by failing to give Mr. St. George a collective agreement? Mr. Seguin testified that his general practice was to have individuals rather than the union pay for personal calls. As no doubt was cast on this general procedure, the evidence will not support a conclusion that Mr. Seguin treated Mr. St. George in a discriminatory manner by calling him collect. As to the collective agreement, we accept Mr. St. George's testimony that Mr. Seguin failed to give him a copy of the collective agreement after saying he would. There is no indication, however, that Mr. Seguin was deliberately trying to prevent Mr. St. George from obtaining a copy of the collective agreement or that he would not have told anyone else who had approached him the same thing. That Mr. Seguin never fulfilled his promise is hardly sufficient to find the union in violation of section 60. The evidence supports the conclusion that with reasonable efforts Mr. St. George could have obtained a copy from the steward at the Camp and that the union was neither impeding his efforts nor discriminating against him.

29. Finally, Mr. St. George's representative argued that because of what he terms the "constitutional prison", Mr. St. George in particular and section 60 complainants in general are unable to get witnesses to defend themselves because of a fear on the part of fellow union members that they will lose their jobs if they testify against the union. He cites section 17b of the By-Laws of the Lumber and Sawmill Workers' Union, Local 2693 which provides that a member may be expelled from the union if he causes dissension in the union ranks. He sets this by-law against section 5.02(a) of the collective agreement which provides that,

Subject to the provisions of The Labour Relations Act...any employee who is...a member in good standing...shall, as a condition of continued employment, maintain such membership in good standing...

Mr. St. George's representative recognizes not only that article 5.02(a) is made "subject to the provisions in The Labour Relations Act", but also that section 71 of the Act provides protection for witnesses and that section 38(2) provides that a trade union cannot compel an employer to discharge an employee who is no longer a member of a trade union. He agrees, therefore, that a member would not actually be dismissed because of his testimony before the Board. However, he argues that the ordinary union member is not aware of this protection and would refuse to testify against the union for fear of being expelled from the union for causing dissension and of being subsequently dismissed from work. The representative took specific note of Mr. Blanchette's circumstances and lamented that because of the "constitutional prison" he was unable to call him as a witness.

30. The Board is aware of the real problem facing witnesses who testify before it. At

times it takes the utmost courage to speak the truth when the truth may not be popular. We are also aware of how difficult it may be for an individual to confront a union, especially if an employer is perceived as having aligned itself with the union against the individual.

31. Notwithstanding the hurdles that may confront a section 60 applicant, it was open to the applicant's representative to compel the attendance of Mr. Blanchette or any other witness through the use of a subpoena. As well, if the circumstances had warranted it, he could have requested the Board to declare the witness "hostile" to seek to afford himself an opportunity to cross-examine his own witness. To despair before making reasonable efforts to obtain witnesses elicits minimal sympathy from the Board and certainly has not persuaded the Board that Mr. St. George has been placed under any undue hardship in the presentation of his case.

32. Accordingly, for the reasons outlined above, the Board finds that the respondent union, through its officer, Mr. Claude Seguin, has not acted in violation of its section 60 duty of fair representation in dealing with Mr. St. George. On the contrary, the Board is of the view that the union acted in a most responsible manner.

33. In a letter dated June 25, 1977, Mr. St. George's representative requested reasons for three of the Board's rulings denying him the right to address certain questions to Mr. Seguin in cross-examination. We refer in sequence to the items as set out in the above mentioned letter:

- a) The first question referred to addressed matters that were outside Mr. Seguin's knowledge and would have elicited a speculative reply; the question also touched matters that were subject to the solicitor-client privilege. Additionally, the question was irrelevant.
- b) The second question was not sufficiently relevant to the section 60 complaint before the Board. The Board was not charged with determining the rightness or wrongness of the suspension itself but only with the union's handling of the discipline. While some testimony going to the merits of the suspension was helpful in resolving the section 60 complaint, the question asked was far too detailed to be even remotely relevant.
- c) The question was not relevant to the resolution of the section 60 complaint.

34. The complaint is hereby dismissed.

0638-77-U John Bernard, (Complainant), v. Scarborough General Hospital and Canadian Union of Public Employees, (Respondent.)

Duty of fair representation – S.79 – Whether failure to process employee discharge grievance constitutes a breach of the union's statutory duty.

BEFORE: Rory F. Egan, Alternate Chairman.

APPEARANCES: John Bernard on his own behalf; Allan Shakes for the respondent hospital; Helen Browne, Thomas Edwards and Danny Sangster for the respondent union.

DECISION OF THE BOARD; November 3, 1977.

1. This is a complaint under section 79 of The Labour Relations Act in which the complainant alleges that he has been dealt with by Canadian Union of Public Employees (hereinafter called "the union") contrary to the provisions of section 60 of the Act.

2. Section 60 provides:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

3. Mr. Bernard outlined in detail to the Board a history of his employment with the hospital. He commenced work as a porter in 1970. He later applied for a job as a hospital nursing assistant. He was turned down at first. He took the matter up with the President of the union and got the appointment in September of 1973. He told the Board that he had objected to being directed to fill in patients' charts as that was not part of his job and that following his objection, which was upheld, a series of complaints about him followed.

4. It is unnecessary to repeat here the various incidents upon which certain disciplinary actions, including discharge, taken by Scarborough General Hospital (hereinafter called "the hospital") against Mr. Bernard were based. Mr. Bernard denied the accuracy of the hospital's version of these incidents both at the time of the discipline and during the course of the hearing before the Board and felt he had been unfairly dealt with by the hospital as well as by the union.

5. The allegations against Mr. Bernard included lack of proper patient care, insubordination and carelessness with respect to the emptying of an ash tray, which resulted in a fire. That there was some consideration shown to Mr. Bernard by the hospital is evidenced by the fact that when it became clear he was having problems in one area, the hospital transferred him to a different area and varying duties. The change of work stations and duties did not result in any improvement in his work relationships, or a reduction in the type of incidents which the hospital considered invited discipline. It was Bernard's basic position that the hospital authorities would not accept his explanations for the various occurrences and that the union was listening and giving credence to the hospital rather than to

him. His complaint is that the union made its decision not to prosecute a grievance without consulting him.

6. There is no doubt that Mr. Bernard had, and has, strong opinions as to how and by whom things should be done in the hospital and that this led, in part at least, to the difficulties in which he found himself.

7. There were three formal disciplinary actions taken by the hospital against Bernard. The first of these occurred on or about June 21, 1976. On that date, Bernard was called to a meeting by Mrs. Hills, who is the Supervisor of Hospital Nursing Assistants. The shop steward, Walter Ryan, was notified of the meeting by Hills and was in attendance throughout.

8. Ryan's evidence is that during the meeting Hills stated that she intended to suspend Bernard but that he, Ryan, convinced her in the course of the meeting that a warning would be more appropriate than a suspension for the incidents involved. As the result of Ryan's intervention on behalf of Bernard, no suspension was issued and, instead, the following document was signed by Hills, Ryan and Bernard:

June 21/76

I had a meeting with Mr. John Bernard today re the incidents on T1 and 3E. Present were Mr. W. Ryan union representative Mr. John Bernard & myself (Mrs. Hills).

I have warned Mr. Bernard that if any further incidents regarding (1) patient care or (2) Insubordination are reported to me I will have to recommend that he be suspended.

(Sgd.)Elizabeth Hills Supervisor
Walter Ryan Steward
John Bernard

9. A month later, on July 22, 1976, there was another meeting called by Hills with Bernard. Again Hills notified the union and a committee comprising Ryan, the shop steward, Forter the President of the Local and Myers were in attendance.

10. Forter testified that the hospital's complaint involved the failure of Bernard to carry out patient care procedures in the proper manner. His evidence was that the supervisor was of the opinion that Bernard should be dismissed. He said that they discussed the whole matter at the meeting. Forter said he told Hills that he was sure the case against Bernard did not warrant dismissal. The result was that instead of being dismissed, Bernard was given a 5-day suspension. The suspension notice stated:

This is to inform you that effective Thursday, July 22, 1976 you are suspended for a period of five (5) working days.

Any further incidents will result in dismissal.

11. Forter stated that he had told Bernard that they, the union, would try to get a sus-

pension rather than a discharge and the impression he got was that this was acceptable to Bernard. Bernard stated that the union had told him that if any of the evidence was true, he would be dismissed. In light of that, he reluctantly accepted the suspension. He told us that the union representatives told him he should try to improve himself.

12. The final disciplinary action was that of the dismissal of Bernard, based upon further allegations, including carelessness that caused a fire in a waste basket, failure to answer the intercom, and to observe patient bathing procedures. The dismissal took place in the presence of Walter Ryan when Bernard was given the following notification:

As a result of further incidents. I have no recourse but to terminate you
as of Wednesday, November 24, 1976.

(Sgd.) Elizabeth Hills, R.N.

13. Ryan testified that Bernard denied the things with which he was charged and that he, Ryan, told him he would talk to the union committee on his behalf. He said that although he did not get the dismissal letter from Bernard, he did discuss the matter with the union committee. Bernard gave the letter to Mr. Daniel Sangster, the chief steward, on the day of his dismissal.

14. Sangster stated that when Bernard gave him the termination letter, he got no definite instructions from Bernard as to what to do. He suggested to Bernard that a meeting be arranged with management so that the matter might be gone into.

15. Bernard was requested by the union President, Forter, to prepare a written statement refuting the hospital's charges. Bernard submitted the following:

Dear Representatives, I Mr J, Bernard is forwarding this letter to inform you that I have been dismiss on the 24 date of november 1976, with out any real justic or human concern. However, in the letter of dismissal, it stated that as a result of further incidents, I have no further recourse but to terminate you as of wednesday, nov-24, 1976. Whereas, I am asking you to take the above state into account to find out what were the further incident. This is Because, my seprvisor told me that she will not defend me at no time what so ever. Whereas, I am working in a group dynamic environments, without out any supervisory protections. Anyway, concerning my dismissal, my supervisor suggest many incidents, but they were unvalid and unreliable. Nevertheless, please take note that this conflict is going on for over one year. And my supervisor always acted bias toward me. This means that this conflict cannot solve that way. From my above statement that I made, whenever, you meet with her again, please look out for those bias. This is because, she should represent all of us in this dynamic group. But please observe my statement in a diplomatic way. Because you will not get the truth so easily. This is because, thing that they say to me whenever I am alone, whenever, we meet with someone from the union the statement change.! Also please take notices that all the reports that wrote against me, I never wrote one against any body!. And also please look at all the

report that wrote against me that is many person signs all of them each time. Whereby, I am just given you all some informations where you can start to make some investigations into, Because the more I tries to become more efficient and comprehensive on the job, is the more report made against me. Thank you all very much for your credible responses.

16. The grievance committee met and discussed the case.

17. A meeting was then arranged with the hospital by the union and it took place on December 8, 1976. Sangster testified that at the meeting all incidents were brought up. He stated that to each allegation Mr. Bernard said it was not true. He said that Bernard did not admit anything.

18. Mr. Sangster said that he annoyed the hospital's Labour Relations Manager, Mr. Shakes, quite a bit during the discussions because he fought very hard for Bernard. Sangster said that he concluded that there was only one course the union could take. He said there were too many allegations against Bernard that were backed up by the R.N.s and the staff that even if the union "took it through", it would have been a waste of time. He stated that Bernard never asked for any particular action and that the union took it up on its own. This action, of course, must have received some impetus from the fact that Bernard gave Sangster the termination notice. He may not have given specific instructions to grieve but, in any event, the union acted on his behalf. Sangster said that the union decided that there was nothing that they could do and that there was just nothing to be gained by going forward. Sangster testified that although Bernard phoned him several times, at no time did Bernard indicate that he wanted the matter to be carried further. Sangster advised him to get in touch with the President for further information on the matter.

19. James Forter was advised by the chief steward about Bernard's dismissal. He stated that the grievance committee decided to approach management concerning the matter. Forter requested Bernard to set out his case in writing and the result of that request has been reproduced above.

20. Forter said that at the meeting with management on December 8, 1976, the management and Bernard were cross-examined by the grievance committee. He stated that it was a lengthy meeting and that the committee went into the matter very thoroughly. The union committee then requested management to leave the meeting. They then told Bernard that the evidence was overwhelming but that they would proceed with a limited grievance if he desired. It is not clear what was meant by a "limited" grievance. In cross-examination Forter said that after the meeting the committee discussed with Bernard the incidents involved and told him that although the chips were stacked against him, they would proceed with a grievance if he insisted. He told the Board that Bernard had telephoned him and had spoken to him at great length following the December 8th meeting, but at no time had he said he wanted to proceed.

21. It is clear upon the evidence that the union responded responsibly in all instances when discipline was administered to Bernard and that they were able to persuade the hospital to reduce the severity of the discipline it intended on two occasions. It is to be recollected that when the time came to deal with the discharge, Bernard had already received a written warning of suspension and a five-day suspension, so that his position and that of the

union was one of extreme difficulty. Notwithstanding that, the union, in our opinion, made every reasonable effort to assist Bernard. We accept, without hesitation, the evidence of Sangster and Forter with respect to what took place on December 8th and, in particular, that having given the matter thorough consideration and concluded that it would be useless to proceed, informed Bernard accordingly.

22. We are therefore satisfied, upon the evidence, that the union did not act in a manner that was arbitrary, discriminatory or in bad faith in dealing with the case of the complainant, Bernard.

23. The complaint is accordingly dismissed.

0843-77-R Galdino Berdwesco, Peter McLean, Don Loder, (Applicants), v. United Steelworkers of America, (Respondent).

Termination – Timeliness – Collective Agreement – Whether termination application untimely where collective agreement initially rejected but subsequently accepted by a second ratification vote.

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: Richard A. Gazzola, Donald Loder and others for the applicant; Lorne Ingle and Carl Gareau for the respondent; William S. Gardner and Russ Franklin for Harter Furniture Ltd.

DECISION OF THE BOARD; November 15, 1977.

1. "United Steel Workers of America Local 8556" appearing in the style of cause of this application as the name of the respondent is amended to read "United Steelworkers of America."

2. This is an application under section 49 of The Labour Relations Act for a declaration that the respondent no longer represents the employees in a bargaining unit for which it is the bargaining agent.

3. The bargaining unit affected by this application consists of certain employees of Harter Furniture Ltd., which company is hereinafter referred to as "the employer."

4. The respondent has raised as a bar to the application a document purporting to be a collective agreement entered into between the employer and the respondent on May 16, 1977. If this document is, in fact, a valid collective agreement there is no dispute but that the application would be untimely.

5. The document relied on by the respondent as a collective agreement clearly meets

all of the objective requirements for a collective agreement set out in section 1(1)(e) of the Act.

6. Counsel for the applicants takes the position that the document being relied upon by the respondent is not a collective agreement in that it was not properly ratified by the employees in the bargaining unit. The evidence establishes that a meeting of employees of the employer was held on May 13, 1977 at which the respondent's negotiating committee put forth for ratification certain terms of settlement for a collective agreement which it and the employer had agreed to. The employees present were advised that the only alternative to ratifying the proposed terms of settlement would be a strike. When a vote was held to ratify the proposed terms of settlement, it was defeated by a count of 17-16. Shortly after the results of this vote were made known, some 8 to 10 employees left the meeting. The meeting, however, continued. After certain further events, which included a warning by Mr. Gerry Reeds, a representative of the respondent, that any strike against the employer was likely to be a lengthy one, the suggestion was raised that a second ratification vote be taken. It is not clear who made this suggestion, but Mr. Reeds did testify that following this suggestion he informed Mr. Bill Henry, the President of the respondent's Local 8556 and the chairman of the meeting, that a second ratification vote would not be out of order. At that point a vote was taken as to whether or not a second ratification vote should be conducted. Those present voted in favour of a second ratification vote, and thus yet another vote was held. This final vote was in favour of accepting the proposed terms of settlement.

7. Although there is no evidence before the Board as to any employee actually casting more than one ballot in any vote, it is clear that two employees were seen with two ballots in their possession at the same time. In at least one instance this situation arose out of the fact that the employee involved had abstained from casting a ballot in the preceding vote.

8. Mr. Reeds in his testimony indicated that the respondents' negotiating committee did not have the authority to enter into a collective agreement without first taking the proposed terms of settlement back to the membership. It is apparent from the evidence that it was on the strength of the second ratification vote that the respondent's officials executed the collective agreement.

9. As indicated above, the position of counsel for the applicants is that having regard to the events at the meeting of May 13, 1977, there was not a proper ratification of the terms of the collective agreement and thus no valid agreement ever came into operation. In support of this proposition counsel relied on three main points, namely that the first ratification vote rejected the proposed terms of settlement, the fact that after the first vote employees were told that any strike would be a lengthy one but were not given the alternative of having a new negotiating team meet with the employer, and finally his contention that irregularities had occurred in connection with the conduct of the voting.

10. Notwithstanding the able arguments of counsel for the applicants, the Board is satisfied that when the representatives of the respondent and the employer met and executed the agreement of May 16, 1977 they in fact entered into a binding collective agreement. Ratification of the proposed terms of a collective agreement is not a requirement under The Labour Relations Act and thus even if no ratification occurred at the meeting of May 13th (and we make no finding in this regard) this fact would not have affected the va-

lidity of the agreement. (See: *Brinton-Peterboro Carpet Co. Ltd.*, (1947) 47 CLLC ¶16,501.) We would stress that the situation here differs from that where parties sign a memorandum of settlement subject to ratification. In such a situation ratification of the memorandum would be a condition precedent to the coming into being of a collective agreement, and thus the question as to whether or not such ratification had occurred would be crucial. Here, however, the respondent and the employer entered into a collective agreement not subject to any such outstanding pre-condition.

11. We wish to stress that our decision in this regard does not stand for the proposition that a trade union has no responsibilities to the employees it represents when it enters into a collective agreement not subject to later ratification. The Act through section 60 requires that when a union does so it must act in a manner that is not arbitrary, discriminatory or in bad faith. The execution of an agreement in circumstances where this standard has not been met (and we do not wish to imply that such occurred here) may well provide the employees with a remedy against the union under that section of the Act. (See: *Zorzi and Nadaline* [1975] OLRB Rep. Oct. 791.) Even in such a situation, however, the resulting collective agreement itself still exists as a binding agreement between its signatories. (See: *Zehr's Markets Limited* OLRB File No. 1151-75-R decisions of May 19, 1976 and July 26, 1976.)

12. Having regard to our conclusion that on May 16, 1977 the respondent and the employer entered into a binding collective agreement, this application is dismissed as being untimely.

0609-77-U Ivan Pletikos, (Complainant), v. United Steelworkers of America Local 3394, (Respondent).

Duty of Fair Representation – S 79 – Whether union failure to process grievance constitutes breach of duty – Effect of substantial delay in filing complaint.

BEFORE: Ian C. A. Springate, Vice-Chairman.

APPEARANCES: *Ivan Pletikos appearing for the complainant; B. Shell appearing for the respondent; Tim Sargeant appearing for F.M.C. of Canada Limited.*

DECISION OF THE BOARD; November 17, 1977.

1. This is a complaint filed under section 79 of The Labour Relations Act which alleges that the complainant has been dealt with by the respondent contrary to the provisions of section 60 of the Act. Section 60 provides that a trade union shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of employees in a bargaining unit.

2. At the commencement of the hearing counsel for the respondent requested by way of a preliminary motion that the Board not entertain this complaint in that the circum-

stances giving rise to it occurred early in June of 1976. Counsel took the position that the delay involved had seriously prejudiced the respondent's ability to deal with the complaint. The Board at the time reserved its decision on the preliminary motion and entertained the evidence of the parties. Having regard to the Board's determination in this matter there appears to be no need to make a ruling with respect to the preliminary motion.

3. The grievor was first employed by F.M.C. of Canada Limited ("the employer") in 1965. At the time of the events giving rise to these proceedings the complainant was working as a production jig mill operator, which was one of the most highly rated jobs provided for in a collective agreement between the employer and the respondent union. In May of 1976 the complainant was declared surplus in his job classification due to a more senior employee purporting to exercise his right to bump into the complainant's classification. The complainant was of the view that the other employee, one Mr. E. Hobe, had no right under the collective agreement to bump into his position. Originally the employer had been of the same view as the complainant, but subsequently it had agreed with the position advanced by the respondent union that Mr. Hobe did, in fact, have the right to bump the grievor on the basis of a specific provision in the agreement relating to the bumping rights of a more senior employee who had previously worked in the job he was now seeking to bump into. It should be noted at this point that the interpretation of the relevant portion of the collective agreement adopted by the respondent union and finally agreed to by the employer was not an unreasonable one.

4. Once the employer and the respondent union reached agreement that Mr. Hobe could bump into the complainant's job classification, the complainant was informed that he was now surplus, but that he would be given an opportunity to exercise his own seniority rights to bump a more junior employee. The complainant, however, indicated that he would be willing to work only as a production jig mill operator or as a horizontal boring mill operator (a position which he had at one time held.) Since neither of these positions were available to the grievor he decided not to exercise his bumping rights but rather instead to exercise his right under the collective agreement to be laid off subject to a possible later re-call into either of the aforementioned positions. The complainant never was re-called by the employer.

5. On July 3, 1976 the complainant sought to file a grievance alleging that he had been improperly displaced from his job classification. At first he experienced some difficulty in this regard due to the reluctance of two stewards to assist him. The stewards were apparently concerned over the fact that the grievance ran contrary to the position previously adopted by the union with respect to the bumping rights of Mr. Hobe. The grievance finally did get filed when Mr. C. Bradbury, the respondent's President, intervened on the complainant's behalf.

6. The grievance went as far as the second step of the grievance procedure. The second step involved a meeting held on June 7, 1976 between certain officials of the employer and of the respondent. The complainant attended at the meeting and was given an opportunity to explain his position. The meeting did not result in a settlement of the grievance. On the following day, June 8, 1976 the grievance was discussed at a general meeting of the respondent's membership. The complainant took an active role in the discussions. As will become clear, there is some discrepancy in the evidence as to what occurred at and subsequent to this meeting.

7. The complainant testified that at the membership meeting it was decided to "go by the book." In his examination in chief he stated that after the meeting he still did not know what would happen to his grievance and thus on the following day, June 9th, 1976, he telephoned Mr. Charlie Acton, the respondent's recording secretary. According to the complainant, Mr. Acton indicated that he would check into the status of his grievance and that on the same afternoon Mr. Acton telephoned him back. The complainant's version as to what Mr. Acton told him was that he had "lost" since the union would not go any further with his grievance in that it had already won the other (i.e., Hobe's) grievance. The complainant further testified that at about this time he also contacted Mr. David Martin, a representative of the United Steelworkers of America. He stated that Mr. Martin told him that the union would not be pursuing his grievance since to do so might "screw up" its negotiations with the employer.

8. The evidence of the witnesses called by the respondent is in conflict with that of the complainant on a number of points. Wherever the conflict is material, the Board accepts the evidence of the respondent's witnesses. It does so to a great extent because the complainant's evidence appears to be unreliable, due at least in part no doubt to the passage of time. On a number of occasions his testimony was in conflict with statements he had made earlier. Further, with respect to a number of issues, not necessarily important in themselves, the complainant clearly demonstrated an inability to accurately remember events. For example, the complainant testified that because the two stewards refused to sign his grievance, the respondent's president himself had to sign it. The grievance which was placed in evidence, however, clearly bears the signature of one of the stewards. The Board also is of the view that the version of events put forward by the respondent's witnesses appears to be more logical in the circumstances than that put forward by the complainant.

9. The version of events put forward by the witnesses for the respondent - which the Board accepts - is that at the membership meeting on June 8, 1976 most of those who participated in the discussion concerning the grievance were of the view that the grievance should not be processed any further. The issue was finally resolved, however, when Mr. C. Bradbury, the respondent's president, announced that it was his view that the complainant's grievance should be taken to the third stage of the grievance procedure. This is the final stage before arbitration. The evidence establishes that notwithstanding that the collective agreement refers to a zone steward taking the initiative in arranging a third stage meeting with the employer, in fact the respondent's practice is to have its president contact Mr. Martin, the union representative, to ensure his attendance at such a meeting and to have the president then arrange for the meeting with the employer. As will be discussed later, Mr. Bradbury never did make these arrangements.

10. The Board is satisfied that neither Mr. Acton nor Mr. Martin told the complainant that the respondent had decided not to carry his grievance forward. A conversation concerning the grievance did occur between the complainant and Mr. Acton. Mr. Acton testified that in response to a request for information from the complainant he contacted Mr. Harry Pyrah, the employer's operations manager, and then telephoned back to the complainant to inform him that *the employer* had rejected his grievance. Mr. Acton's version is borne out by the complainant's testimony during cross examination when (despite his earlier testimony) he said that when he had phoned Mr. Acton to obtain the results of his grievance, Mr. Acton replied he did not know but that "he would ask Harry." Also during his cross-examination the complainant moved away from his earlier statement that he had tele-

phoned Mr. Acton the day after the membership meeting and stated instead that he could not remember if the conversation had occurred before or after the meeting. Although Mr. Acton in his testimony did not address himself to the date of the conversation, it seems logical to conclude that it in fact occurred at some point prior to June 8, 1976. With respect to the complainant's comments regarding what Mr. Martin allegedly said to him, Mr. Martin's testimony was to the contrary. Mr. Martin stated that he did not remember being telephoned by the complainant, but that having regard to the fact that he services employees in 18 different bargaining units such a conversation might well have occurred without him remembering it. If he had received such a phone call, continued Mr. Martin, he would simply have referred the grievor back to his local union. Mr. Martin emphatically denied that he ever would have stated that to proceed with the complainant's grievance might "screw up" negotiations.

11. It perhaps bears repeating that all of the events referred to above occurred in early June of 1976. As indicated above, the Board is satisfied that at this time the complainant was not told that the respondent would not be processing his grievance any further but that to the contrary it had decided to do just that. The Board is further satisfied that the person responsible for initiating any further action on the part of the respondent was Mr. Bradbury, its president.

12. There is no evidence before the Board as to what action, if any, Mr. Bradbury took with respect to the complainant's grievance. It is clear, however, that he contacted neither Mr. Martin nor the employer to set up a 3rd step grievance meeting. Indeed on or about June 24, 1976 Mr. Bradbury resigned his position with the employer and ceased to play any role in the respondent's affairs. Mr. Shell, appearing on behalf of the respondent, indicated that about this time the respondent lost all contact with Mr. Bradbury. On or about July 8, 1976 Mr. M. Davidson, the respondent's vice-president, assumed the role of president. It appears that neither Mr. Davidson, nor any other official of the respondent, took any action with respect to the complainant's grievance. Neither, however, did the complainant.

13. During or about the month of September, 1976 the complainant obtained alternative employment with another employer and, absent yet another development, that might well have ended the matter. However, in April of 1977, approximately seven months after he had started his new job, the complainant first became aware of the fact that the employer was closing down the plant where he had previously been employed and that the employees affected by the closure would be receiving certain termination payments pursuant to the provisions of The Employment Standards Act. The complainant then approached the employer requesting that he too receive termination pay. The employer, however, refused taking the position that since the complainant had at the time of his lay off refused to take other employment which had been open to him, there was now no requirement under The Employment Standards Act that the employer pay him any termination pay. Having received this reply, the complainant in July of 1977 filed this complaint against the respondent union alleging that it had violated section 60 of The Labour Relations Act by the manner in which it had handled his grievance back in June of 1976. In response to a question posed to him at the hearing by counsel for the employer, the complainant conceded that his purpose in filing this complaint was to seek to obtain the termination pay which he felt the employer should have paid to him. Having regard to this evidence, the Board is satisfied that the grievor long before the filing of this complaint had in fact abandoned his grievance and is now

only seeking to revive it as an issue in an attempt to collect the severance pay which he feels is his due.

14. With respect to the actual allegation that the respondent in its handling of the complainant's grievance acted in a manner that was arbitrary, discriminatory or in bad faith, the Board has no difficulty in finding that at least until July 8, 1976 the respondent did not act in any such manner. However, this but raises to the fore the fact that subsequent to July 8, 1976 no further action was taken with respect to the processing of the complainant's grievance, notwithstanding that a decision had been made that further action should be taken.

15. With respect to Mr. Bradbury's involvement there is no direct evidence before the Board as to what decisions he may, or may not, have made with respect to the grievance. As counsel for the respondent pointed out Mr. Bradbury upon further reflection may well have changed his mind and concluded that the complainant's grievance did not warrant being processed any further. Alternatively he may have decided for some improper reason not to proceed with it to step 3. The most reasonable assumption, however, appears to be that upon severing his ties with the respondent Mr. Bradbury simply neglected to either make the necessary arrangements for the step 3 grievance meeting or to arrange for someone else to do so. Such a failure on his part may well have amounted to a form of inadvertence or even negligence. The Board is not satisfied, however, that it constituted conduct which was arbitrary, discriminatory, or in bad faith, the only three types of conduct proscribed by section 60.

16. The Board turns now to consider the respondent's failure to take any action with respect to the complainant's grievance between July of 1976, when Mr. Davidson took over the presidency, until July of 1977 when this complaint was filed. No evidence was led by the respondent to explain this lack of action. Thus the Board does not know whether the matter was simply overlooked when the new president took charge or whether there were some other factors involved. The question then is whether lacking such knowledge the Board should be prepared to assume the respondent did in fact act in a manner that was arbitrary, discriminatory, or in bad faith. In the particular circumstances of this case the Board is not prepared to make that assumption. The Board would note, however, that had the facts here been different, such that instead of abandoning his grievance the complainant had at some point in time contacted the respondent to raise the issue of his grievance, and had the complainant at the hearing failed to lead any direct evidence to show that it had at that point put its mind to the actions it should take with respect to the grievance, then the Board's decision would likely have been very different.

17. Before leaving this matter, it would perhaps be in order to note that this Board does not administer The Employment Standards Act, and that this decision is not meant to be determinative of any rights which the complainant may have under that Act.

18. In that the complainant has not satisfied the Board that the respondent has violated section 60 of the Act, the Board hereby dismisses the complaint.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 1977

BARGAINING AGENTS CERTIFIED DURING OCTOBER

No Vote Conducted

1394-75-R: York University Faculty Association (Application) v. York University (Respondent) v. Osgoode Hall Faculty Association, et al (Intervener) v. Group of Employees (Objectors).

Unit: "all full-time faculty and full-time professional librarians employed by York University in the Municipality of Metropolitan Toronto save and except the President, Deans (except the Dean of Students of Glendon College), Associate Deans, Directors of Research Centres and Institutes, Faculty members on the Board of Governors, Director of Libraries, Associate Director of Libraries, Assistant Director of Libraries (Technical Services), Director of the Office of International Services, Faculty teaching at York University while on leave from other universities or educational institutions, Director of the Division Research and Executive Development, Director of the Department of Instructional Aid Resources, and all faculty members of the university assigned to the Osgoode Hall Law School." (000 employees in the unit). (*Having regard to the agreement of the parties*).

1293-76-R: Canadian Union of Public Employees (Applicant) v. Canadian Council on Social Development (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Ottawa, Ontario, save and except executive director, director of administration, assistant to executive director, program, accountant registrar, chief Librarian, secretaries to the executive director and director of administration, persons employed on contract of less than six months duration, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (31 employees in the unit).

0005-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation Number 46 and/or Medhurst Hogg and Associates Limited (Respondents).

Unit: "all employees of York Condominium Corporation Number 46, engaged in cleaning and maintenance of buildings located at 50 Lotherton Pathway, 100 Lotherton Pathway, 200 Lotherton Pathway, 101 Lotherton Parkway and 940 Caledonia Road, including residential superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (8 employees in the unit). (*Having regard to the agreement between York and the applicant*).

0078-77-R: Association of Commercial and Technical Employees, Local 1704, C.L.C. (Applicant) v. Parkdale Community Legal Services (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except the Director, Associate Director, Group Leader of the Personnel Management Group, persons regularly employed for not more than 24 hours per week, summer students, graduate students, Osgoode Hall Law School students enrolled in the Parkdale Community Legal Services academic program and persons employed for specified limited terms of employment under special funding arrangements." (19 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1977) OLRB Rep. October).

0434-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Atlantis – Dellpark Towers (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 6161 and 6171 Bathurst Street, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (6 employees in the unit). (*Having regard to the agreement of the parties*).

0486-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Echod Holdings Inc. (Respondent).

Unit: "all employees of the respondent engaged in cleaning at The Guild Lawrence Town Houses, 4060, 4062 and 4064 Lawrence Avenue East, Scarborough, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (2 employees in the unit).

0487-77-R: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. 332518 Ontario Limited, (otherwise known as "International Chinese Restaurant") (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except managers, persons above the rank of manager and office staff." (147 employees in the unit). (*Having regard to the agreement of the parties*).

0622-77-R: United Steelworkers of America (Applicant) v. Odnokon Construction (Respondent).

Unit: "all employees of the respondent at Agnew Lake Mines, Agnew Lake, Hyman Township, save and except foremen, persons above the rank of foreman, office staff, and students employed during the school vacation period." (00employees in the unit).

0625-77-R: Retail Clerks Union, Local 486 Chartered by the Retail Clerks International Association (Applicant) v. Quinte Sanitation Services Limited (Respondent).

Unit: "all employees of the respondent at R.R. # 3, Belleville, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and students employed during the school vacation period." (27 employees in the unit). (*Having regard to the agreement of the parties*).

0669-77-R: Canadian Chemical Workers Union (Applicant) v. Unicorn Abrasives of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its plant in Brockville Ontario save and except foremen, those above the rank of foreman, office and sales staff and students employed during the school vacation period." (62 employees in the unit).

0748-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Chapman Homes (A Division of Altona Heights Properties Ltd.) (Respondent).

Unit: "all construction labourers employed on residential construction, employed by the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman." (6 employees in the unit).

0757-77-R: Canadian Union of Public Employees (Applicant) v. District Municipality of Muskoka (Respondent).

Unit #1: "all employees of the respondent save and except supervisors, persons above the rank of supervisor, office and clerical staff and employees of the Muskoka District Home for the Aged." (19 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1977) OLRB Rep. October). (*Certified*).

Unit #2: "all office and clerical employees of the respondent save and except Department Heads, persons above the rank of Department Head, persons regularly employed for not more than twenty-four hours per week and employees of the Muskoka District Home for the Aged." (29 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1977) OLRB Rep. October). (*Dismissed*).

0774-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. F. W. Sawatzky Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (00 employees in the unit).

0776-77-R: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Applicant) v. Kernohan Lumber & Sash Co. Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of Kernohan Lumber & Sash Co. Limited at London, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, part-time employees regularly employed for twenty-four hours per week or less and students employed during summer vacation." (29 employees in the unit).

Unit #2: "all part-time employees regularly employed for twenty-four hours per week or less and all students employed during summer vacation of the Kernohan Lumber & Sash Co. Limited at London, Ontario." (4 employees in the unit).

0819-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Mor-Alice Construction Limited Philmor Developments Limited (Respondents).

Unit: "all construction labourers employed in residential construction, employed by the respondents, Mor-Alice Construction Limited and Philmor Developments Limited in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen, persons above the rank of non-working foremen." (13 employees in the unit). (*Having regard to the agreement of the parties*).

0821-77-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Association (Applicant) v. VS Services Ltd. (Respondent).

Unit: "all employees of the respondent at the premises of the Royal Ontario Museum, (Avenue Rd & Bloor) 100 Queen's Park Cr., save and except supervisors, persons above the rank of supervisor, persons employed for not more than 24 hours per week and students employed during the school vacation period." (24 employees in the unit). (*Having regard to the agreement of parties*).

0876-77-R: The International Union of Bricklayers and Allied Craftsmen Local No. 12, Kitchener Ontario, formerly Bricklayers, Masons and Plasterers International Union of America Local No. 12, Kitchener, Ontario (Applicant) v. Sunset Drywall Plaster Limited (Respondent).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in The Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. October.*)

0882-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Condiversal Limited (Respondent) v. The Labour Bureau of the Ontario Road Builders Association and of the Ontario Sewer and Watermain Contractors Association (Intervener).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (20 employees in the unit).

0910-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Construction Division of King Paving & Materials, A Division of The Flintkote Company of Canada Limited (Respondent).

Unit: "all employees of the respondent working at its Kilbride (Dubois) Pit located on McNiven Road in Burlington, save and except foremen, persons above the rank of foreman, scaleman and dispatcher." (4 employees in the unit). (*Having regard to the agreement of the parties.*)

0950-77-R: United Steelworkers of America (Applicant) v. Herby Enterprises Limited (Respondent).

Unit: "all employees of the respondent within the Regional Municipality of Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in the unit). (*Having regard to the agreement of the parties.*)

0963-77-R: United Steelworkers of America (Applicant) v. International Harvester Company of Canada, Limited (Respondent).

Unit: "all employees of the respondent company at Sudbury, Ontario, save and except service manager, parts manager, persons above the rank of service manager and parts manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (9 employees in the unit). (*Having regard to the agreement of the parties.*)

0974-77-R: Hotel & Restaurant Employees' and Bartenders' International Union – Local 412 (Applicant) v. Polish-Canadian Association Club (White Eagle) (Respondent).

Unit: "all persons employed by the respondent at the White Eagle Club, 232 Goulais Avenue, Sault Ste. Marie, as bartenders, waiters and waitresses except supervisors and persons above the rank of supervisor." (6 employees in the unit).

0975-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Andre Raymond Electric (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Having regard to the foregoing.*)

0982-77-R: Christian Labour Association of Canada (Applicant) v. Orillia Steel Works Inc. (Respondent).

Unit: "all millwrights and millwrights' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. October.*)

0985-77-R: Retail Clerks International Association (Applicant) v. Terra Footwear Limited (Respondent).

Unit: "all employees of the respondent at its plant located in Markdale, save and except foremen, foreladies, persons above the rank of foreman and forelady, and office and sales staff." (44 employees in the unit). (*Having regard to the agreement of the parties*).

0988-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Tobecon Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

0996-77-R: Christian Labour Association of Canada (Applicant) v. Ausable Springs Inc. carrying on business as Chateau Gardens Parkhill (Respondent).

Unit: "all employees of the respondent in the Town of Parkhill, save and except registered nurses, supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period." (26 employees in the unit). (*Having regard to the agreement of the parties*).

0997-77-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Byers Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

0999-77-R: International Union of Electrical Workers Local Union 105 (Applicant) v. Philip Doyle Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1000-77-R: Service Employees Union, Local 478 (Applicant) v. Extendicare Ltd., Haliburton (Respondent).

Unit: "all employees of Extendicare Ltd. in Haliburton who are regularly employed for not more than twenty-four hours per week, and all students employed during the school vacation period, save

and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements." (7 employees in the unit).

1003-77-R: Graphic Arts International Union Local 35-P Toronto, Ontario (Applicant) v. Roto-Tone Gravure Service Ltd. (Respondent).

Unit: "all photo engravers and apprentices in the employ of the respondent at 3091 Wharton Way, Mississauga, Ontario, save and except manager and persons above the rank of manager." (34 employees in the unit). (*Having regard to the agreement of the parties*).

1010-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Aldershot Contractors Equipment Rental Limited (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener).

Unit: "all employees of the respondent at its garage in Burlington, Ontario save and except dispatchers, supervisors and foremen, those above the rank of dispatcher, supervisor and foreman, office and sales staff and those covered by existing collective agreements." (18 employees in the unit). (*Having regard to the agreement of the parties*).

1017-77-R: International Brotherhood of Painters and Allied Trades Local 1795 Glaziers Hamilton (Applicant) v. J D's Glass and Mirror Ltd. (Respondent).

Unit: "all glaziers, glaziers' apprentices and metal mechanics in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nassagaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1018-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. Faust Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

1020-77-R: Labourers' International Union of North America, Local 837 (Applicant) v. Ajax Engineers Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1026-77-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Gino's General Welding and Fabricating Limited (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. October*).

1036-77-R: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. A N D Construction Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa – Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1037-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Applicant) v. Fleck Manufacturing Company (Respondent).

Unit: "all employees of the respondent in Huron Park, save and except foremen, persons above the rank of foreman, office and sales staff, persons employed less than 24 hours per week and students employed during the school vacation period." (155 employees in the unit).

1038-77-R: Canadian Union of Public Employees (Applicant) v. The Lanark and District Association for the Mentally Retarded (Respondent).

Unit: "all employees of the Respondent at Carleton Place, Ontario, save and except the Executive Director." (6 employees in the unit).

1046-77-R: Labourers' International Union of North America, Local 1036 (Applicant) v. Perwin Construction Co. (Respondent).

Unit: "all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (16 employees in the unit).

1052-77-R: Optical & Plastic Technicians & Allied Workers Union – Local 67 of the U.H.C. & M.W.I.U. – C.L.C. (Applicant) v. Imperial Optical Company Ltd. (Respondent).

Unit: "all laboratory employees of Imperial Optical Company Ltd. in its prescription laboratory at Oshawa, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and persons regularly employed for not more than 24 hours per week, and students employed during school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1055-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 76 (Respondent #2).

Unit: "all employees of respondent #2 regularly working for not more than 24 hours a week engaged in cleaning and maintenance at York Condominium Corporation No. 76 (Crescent Town Condominiums and Recreation Centre – Danforth and Victoria Park) save and except office, sales, clerical and supervisory staff." (9 employees in the unit).

1063-77-R: Laborers' International Union Local 1267 (Applicant) v. Superior Sanitation Services Division of Interflow Systems Ltd. (Respondent).

Unit: "all employees of the respondent working at and out of the city of Sudbury save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (4 employees in the unit).

1064-77-R: Ontario Nurses Association (Applicant) v. Rainycrest Home for the Aged (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity at the Rainycrest Home for the Aged, Fort Frances, Ontario, save and except the Director of Nurses and persons above the rank of Director of Nurses." (10 employees in the unit).

1065-77-R: Ontario Nurses' Association (Applicant) v. Kincardine and District General Hospital (Respondent) v. Group of Employees (Respondents).

Unit #1: "all registered and graduate nurses employed in a nursing capacity by the respondent at Kincardine, Ontario, save and except head nurses and persons above the rank of head nurse, and persons regularly employed for not more than 24 hours per week." (14 employees in the unit).

Unit #2: "all registered and graduate nurses employed in a nursing capacity by the respondent at Kincardine, Ontario for not more than twenty-four hours per week, save and except head nurses and persons above the rank of head nurse." (16 employees in the unit).

1067-77-R: International Molders & Allied Workers Union (Applicant) v. Canada Valve Supply (A Division of Canada Valve Ltd.) (Respondent).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons who regularly work twenty-four (24) hours per week or less, and students hired for the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1075-77-R: Christian Labour Association of Canada (Applicant) v. Comet Contracting 2000 Limited (Respondent).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1083-77-R: Amalgamated Meat Cutters & Butcher Workmen of North America, A.F.L. – C.I.O. – C.L.C. (Applicant) v. Standard Brands Food Company (Respondent).

Unit: "all employees of the respondent at 2463 Royal Windsor Drive, Mississauga, Ontario, save and except office, sales and laboratory staff, foremen and those above the rank of foreman." (98 employees in the unit). (*Having regard to the agreement of the parties*).

1084-77-R: Christian Labour Association of Canada (Applicant) v. Don Ellis Construction Limited (Respondent).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit). (*Having regard to the foregoing*).

1085-77-R: Christian Labour Association of Canada (Applicant) v. Seminole Management and Engineering Company Ltd. (Respondent).

Unit: "all employees of the respondent employed in the City of Windsor, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (12 employees in the unit).

1086-77-R: Teamsters Union Local 938 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. All-Ontario Transport Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all drivers and mechanics of the respondent working at and out of Mississauga, save and ex-

cept dispatchers, persons above the rank of dispatcher, office and sales staff.” (50 employees in the unit).

1087-77-R: International Union United Plant Guard Workers of America Local 1962 (Applicant) v. Trizec Equities Limited (Respondent).

Unit: “all Security Guards employed by the respondent at Scarborough Town Centre, in the Borough of Scarborough, Municipality of Metropolitan Toronto, save and except supervisors and persons above that rank, and persons regularly employed for twenty-four hours per week or less.” (6 employees in the unit).

1088-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Delta Faucet of Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Bowmanville, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed for the school vacation period.” (53 employees in the unit). (*Having regard to the agreement of the parties*).

1099-77-R: The Carpenters’ District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Keais Construction Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1146-77-R: Christian Labour Association of Canada (Applicant) v. Coons Heating & Sheet Metal Limited (Respondent).

Unit: “all sheet metal workers and sheet metal apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

2173-76-R: Graduate Assistants Association (Applicant) v. The Board of Governors of Ryerson Polytechnical Institute (Respondent).

Unit: “all part-time and sessional instructors in the employ of the respondent in Metropolitan Toronto, save and except those employees represented by the Ryerson Faculty Association and those instructors engaged in the Division of Evening Studies, the Division of External Programmes and the open college of the respondent.” (206 employees in the unit).

Number of names of persons on list as originally prepared by employer	347
Number of persons who cast ballots	51
Ballots cast by persons not on list	1
Number of ballots cast by sessional Instructors	28
Number of Ballots cast by part-time Instructors	19
Number of Ballots cast by part-time evening Studies Instructors	3

1032-77-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. A. V. Hallam Lathing & Plastering Limited (Respondent) v. Marble Masons, Tile Layers and Terrazzo Workers Union No. 31, affiliated with the Bricklayers, Masons and Plasterers International Union of America (Intervener #1) v. Operative Plasterers & Cement Masons' International Association of the United States and Canada, Local 124, Ottawa-Hull (Intervener #2).

Unit: "all plasterers and plasterers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York, the Regional Municipality of Peel, the Township of Essex and the Towns of Oakville and Milton in the Regional Municipality of Halton and the Town of Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener #1	1

0759-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Applicant) v. Addressograph Multigraph of Canada Limited (Respondent) v. Addressograph-Multigraph Employees' Association (Intervener).

Unit: "all employees at its 42 Hollinger Road plant, 50 Hollinger Road plant and 20 Bermondsey Road plant in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office, sales, service, security and planning and engineering department staff, trainees and casual employees and students employed during school vacation periods." (92 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	77
Number of persons who cast ballots	72
Number of ballots marked in favour of applicant	42
Number of ballots marked in favour of intervener	30

Application Certified Subsequent to Post-Hearing Vote

0816-77-R: London and District Service Workers' Union Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Hospital Commission Sarnia General Hospital (Respondent).

Unit: "all employees of the respondent at Sarnia regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, persons above the rank of supervisor and office staff." (73 employees in the unit).

Number of names of persons on revised voters' list	52
Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	17
Number of ballots marked against applicant	7

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0030-77-R: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Association (Applicant) v. VS Services Ltd. (Respondent) v. Employees (Objectors). (2 employees).

0432-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Armbro Materials & Construction Ltd. (Respondent). (4 employees).

0602-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Gillies-Guy Division of CFMG Inc. (Respondent). (14 employees).

0875-77-R: United Brotherhood of Carpenters and Joiners of America, Local 2679 (Applicant) v. Premium Forest Products Limited (Respondent).

Unit: "all employees of the respondent at its plant in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (302 employees in the unit). (*Having regard to the agreement of the parties*).

Certification Dismissed Subsequent to Pre-Hearing Vote

0895-77-R: Canadian Paperworkers Union (Applicant) v. BASF Canada Ltd., Cornwall Works (Respondent).

Voting Constituency: "All office, clerical and technical employees of BASF Canada Ltd., Cornwall Works." (21 employees).

Number of names of persons on list as originally prepared by employer	21
Number of persons who cast ballots	20
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	17

0908-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Applicant) v. Allen Industries Canada Limited (Respondent).

Voting Constituency: "All office, clerical and technical employees of Allen Industries Canada Limited at Hamilton, Ontario, save and except supervisors, section heads, persons above the rank of supervisor and section head, traffic co-ordinator, secretary to the vice-president, secretaries to the personnel manager, nurses, sales representatives, engineers, (trim, time study, fibre, tool and processing) and students employed during the school vacation period." (34 employees).

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	36
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	24

0927-77-R: Canadian Chemical Workers Union (Applicant) v. Electrolux (Canada) Limited (Respondent).

Voting Constituency: "All employees of the Respondent at its Plant in Brockville, Ontario save and except foremen, those above the rank of foreman, Office Staff, Sales Staff, Technical Staff and students hired for the summer vacation period." (110 employees).

Number of names of persons on list as originally prepared by employer	109
Number of persons who cast ballots	106
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	30
Number of ballots marked against applicant	76

0931-77-R: United Electrical, Radio and Machine Workers of America, (UE) (Applicant) v. CEB Limited (Respondent).

Voting Constituency: "All employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (499 employees). (*clarity note - see Report of full decision (1977) OLRB Rep. October*).

Number of names of persons on revised voters' list	499
Number of persons who cast ballots	455
Ballots segregated and not counted	10
Number of spoiled ballots	4
Number of ballots marked in favour of applicant	181
Number of ballots marked against applicant	260

Certification Dismissed Subsequent to Post-Hearing Vote

0407-77-R: London and District Service Workers' Union, Local 220 S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Raphael's Nursing Homes Limited (Kitchener) (Respondent).

Voting Constituency: "All employees of St. Raphael's Nursing Homes Limited at Kitchener, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff and office staff." (38 employees).

Number of names of persons on revised voters list	41
Number of persons who cast ballots	24
Number of ballots marked in favour of applicant	7
Number of ballots marked against applicant	17

0428-77-R: Canadian Union of Public Employees (Applicant) v. Fountainview Gardens Nursing Home (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Fountainview Gardens Nursing Home at Orangeville, Ontario, regularly em-

ployed for not more than 24 hours per week, save and except supervisors, persons above the rank of supervisor, professional medical staff, registered nurses, graduate and undergraduate nurses, pharmacists, dieticians, physiotherapists, occupational therapists, office and clerical staff." (9 employees in the unit).

Number of names of persons on list as originally prepared by employer	9
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	4

0523-77-R: United Cement, Lime and Gypsum Workers International Union (Applicant) v. Franceschini Bros. Construction Ltd. (Respondent).

Voting Constituency: "All employees of the Respondent engaged as drivers to haul materials out of the Respondent's yard located on Cawthra Road in the City of Mississauga, Leaver Sand Pit in the City of Mississauga, Brampton Pit in the City of Brampton, Petch Pit in the Region of Peel, and Dodds Pit in the Region of Peel, save and except dispatchers, persons above the rank of dispatcher, office and sales staff, and employees working inside the above noted locations." (96 employees).

Number of names of persons on revised voters' list	50
Number of persons who cast ballots	49
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	37

0795-77-R: United Steelworkers of America (Applicant) v. Canadian Industries Limited, Explosives Division, Garson, Ontario Works (Respondent).

Unit: "all employees of the Respondent employed at the Explosives Division, in the Regional Municipality of Sudbury, save and except foremen, persons above the rank of foreman, office and sales staff." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer	10
Number of persons who cast ballots	9
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5

0879-77-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local 647 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Morrison LaMothe Foods Limited, Bakery Division (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at its Bakery Division in Ottawa, save and except foremen, route supervisors, sales supervisors, persons above the rank of foreman, route supervisor or sales supervisor, office and clerical staff including Production Control and Quality Control, employees of the Order Department, employees of the Returned Goods Department, security guards, employees working for 24 hours per week or less, students employed for the school vacation periods and employees covered by a subsisting Collective Agreement with Bakery and Confectionery Workers' International Union of America Local 322." (63 employees in the unit).

Number of names of persons on revised voters' list	62
Number of persons who cast ballots	60
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	31

0880-77-R: Christian Trade Unions of Canada (Local 6) (Applicant) v. Adanac Ornamental Iron Works Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees employed at and working out of the respondent's shop located at 1224 Stone Church Road East in Hamilton in the County of Wentworth, save and except non-working foremen, persons above the rank of non-working foremen, office and sales staff." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer	7
Number of persons who cast ballots	7
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1519-76-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Bread Division of Corporate Foods Limited (Respondent). (6 employees).

1520-76-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Bread Division of Corporate Foods Limited (Respondent). (2 employees).

1521-76-R: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Bread Division of Corporate Foods Limited (Respondent). (3 employees).

0849-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Whitehall Homes (Eastern Division) (Respondent). (3 employees).

0855-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Rideau Valley Construction Limited, Gaffney (Respondents). (15 employees).

0898-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Jovin Contracting Ltd. (Respondent). (4 employees).

1045-77-R: Labourers' International Union of North America (Applicant) v. Rogo Forming Limited (Respondent). (4 employees).

1107-77-R: Hotel & Restaurant Employees & Bartenders Union Local 197 (Applicant) v. Club 67. Plummers & Pipe Fitters Union Hamilton, Ont. (Respondent). (2 employees).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0342-77-R: Kenneth R. Graham, John Pelletier, David Pratt and James Muise (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. High City Holdings Limited (Intervener). (4 employees). (*Dismissed*).

0419-77-R: William Scott (Applicant) v. International Union of Doll & Toy Workers of the U.S.A. and Canada, Local 905 (Respondent). (*Granted*).

Unit: "all employees of Standard Brands Canada Limited at its plant located at 2463 Royal Windsor Drive, Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (101 employees in the unit).

Number of names of persons on list as originally prepared by employer	90
Number of persons who cast ballots	86
Number of spoiled ballots	4
Number of ballots marked in favour of Respondent	1
Number of ballots marked against Respondent	81

0768-77-R: Elroy Yandt (Applicant) v. Lumber and Sawmill Workers Union Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Respondent) v. Malette Lumber Inc. (Intervener). (*Terminated*).

Unit: "all employees who are engaged at and out of the plant operations of the company at Haileybury, save and except foremen, persons above the rank of foreman and office staff." (39 employees in the unit).

Number of names of persons on list as originally prepared by employer	44
Number of persons who cast ballots	39
Number of ballots marked in favour of Respondent	4
Number of ballots marked against Respondent	35

0838-77-R: Walter Cvijic (Applicant) v. Labourers' International Union of North America, Local 183 (Respondent) v. York Condominium Corporation No. 77 (Intervener). (4 employees). (*Dismissed*).

0989-77-R: Frank Emerson Duxbury (Applicant) v. The United Automobile Aerospace and Agricultural Implement Workers of America, U.A.W. Local 124 (Respondent) v. Volvo Canada Ltd. (Intervener). (10 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

0044-77-U: Ainsworth Electric Co. Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 353; W. Chapman, M. Hughes and R. Carroll (Respondents). (*Withdrawn*).

0811-77-U: International Brotherhood of Electrical Workers, Local Union 105 (Applicant) v. Rondar Services Limited and Darvin H. Puhl (Respondents). (*Dismissed*).

1077-77-U: Comstock International Limited (Applicant) v. Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent). (*Withdrawn*).

1141-77-U: Arthur G. McKee and Company of Canada Limited (Applicant) v. Lodge 128, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, John Patterson, Thomas Buchan, Merile Elliott, Stanley Heath and Winston Lewellyn (Respondents). (*Withdrawn*).

1142-77-U: Foster Wheeler Ltd. (Applicant) v. Lodge 128, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, (A.F.L. – C.I.O.) and Charles Duffy et al (See Schedules A and B attached hereto) (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0217-77-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC and Retail, Wholesale and Department Store Union Local 461 (Applicant) v. Humpty Dumpty Foods Limited (Respondent). (*Withdrawn*).

0261-77-U: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation Number 46, Medhurst Hogg and Associates Limited and David G. Medhurst (Respondents). (*Withdrawn*).

0942-77-U: Labatt's Limited (Metro Toronto Brewery) (Applicant) v. David Aaron, Claude Anderson, David Anderson, George Antczak, Tibor Aracs, William Ash, etc. (all of the employees named in Schedule "A") (Respondents). (*Withdrawn*).

1076-77-U: Comstock International Limited (Applicant) v. Local 800 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Respondent). (*Withdrawn*).

1078-77-U: Comstock International Limited (Applicant) v. M. Vaillancourt et al (See Schedule "A" attached) (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0116-77-U: Warehousemen and Miscellaneous Drivers Union Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Consumers Distributing Company Limited (Respondent). (*Granted*).

0131-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Centrac Industries Limited (Respondent). (*Granted*).

0182-77-U: Rupert S. Martin (Complainant) v. The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 3227, 3233 of the United Brotherhood of Carpenters and Joiners of America (Respondent). (*Dismissed*).

0222-77-U: Retail, Wholesale and Department Store Union, AFL-CIO-CLC and Retail Wholesale and Department Store Union, Local 461 (Complainant) v. Humpty Dumpty Foods Limited (Respondent). (*Withdrawn*).

0260-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation Number 46, Muntaz Ally, Medhurst Hogg and Associates Limited and David G. Medhurst (Respondents). (*Terminated*).

0310-77-U: Graphic Arts International Union Local 28-B (Complainant) v. Bruce Henderson Limited (Respondent). (*Withdrawn*).

0500-77-U: Canadian Union of Public Employees Local #134 (Complainant) v. The Board of Education for the City of Toronto (Respondent). (*Withdrawn*).

0566-77-U: Service Employees Union, Local 204, affiliated with A.F. of L., C.I.O., C.L.C. (Complainant) v. 332518 Ontario Limited, carrying on business as International Chinese Restaurant (Respondent). (*Granted*).

0592-77-U: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Ontario Hydro (Respondent). (*Terminated*).

0749-77-U: Canadian Union of Public Employees (Complainant) v. Canadian Council on Social Development (Respondent). (*Withdrawn*).

0796-77-U: Stan Babad (Complainant) v. Sunnybrook Hospital Employees' Union, Local 777 (Respondent) v. Sunnybrook Hospital (Intervener). (*Dismissed*).

0841-77-U: United Plant Guard Workers of America, Local 1962 (Complainant) v. Olympia and York Developments Limited (Respondent). (*Withdrawn*).

0965-77-U: Labourers' International Union of North America, Local 183 (Complainant) v. Kendall Refining Division – Witco Chemical Canada Limited (Respondent). (*Withdrawn*).

0992-77-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW) (Complainant) v. Titan Proform Company Limited (Respondent). (*Dismissed*).

1006-77-U: Josip Pavlakovich (Complainant) v. International Brotherhood of Electrical Workers Local 1590 and ITE Industries Limited (Respondent). (*Withdrawn*).

1082-77-U: United Brotherhood of Carpenters and Joiners of America, AFL-CIO-CLC (Complainant) v. Viceroy Construction Company Limited (Respondent). (*Withdrawn*).

1092-77-U: Roderick Clapp (Complainant) v. Local 247, Laborers' International Union (Respondent). (*Withdrawn*).

1094-77-U: James Cannon (Complainant) v. Local 247, Laborers' International Union (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 39

0964-77-M: Paul Dietz (Applicant) v. Canadian Chemical Workers Union (Respondent Trade Union) v. Drug Trading Company Limited (Respondent Employer). (*Granted*).

APPLICATIONS UNDER SECTION 55

0742-77-R: Labourers' International Union of North America, Ontario Provincial District Council on behalf of Local 247, and Labourers' International Union of North America, Local 247 (Applicant) v. Ray Keeler Construction Limited and K. W. G. Construction (Respondents). (*Terminated*).

0925-77-R: International Brotherhood of Electrical Workers, Local Union 353 (Applicant) v. Base Electric Company Limited, Tron Electric Company Limited, Virgo Electric Limited, Flag Electric Company Limited, Code Electric Company Limited and Weston Electric Limited (Respondents). (*Withdrawn*).

JURISDICTIONAL DISPUTE

0593-77-JD: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Complainant) v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, Ontario Hydro (Respondent). (*Dismissed*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0720-77-M: International Association of Machinists & Aerospace Workers (Applicant) v. Waterloo Manufacturing Co. Ltd. (Respondent). (*Withdrawn*).

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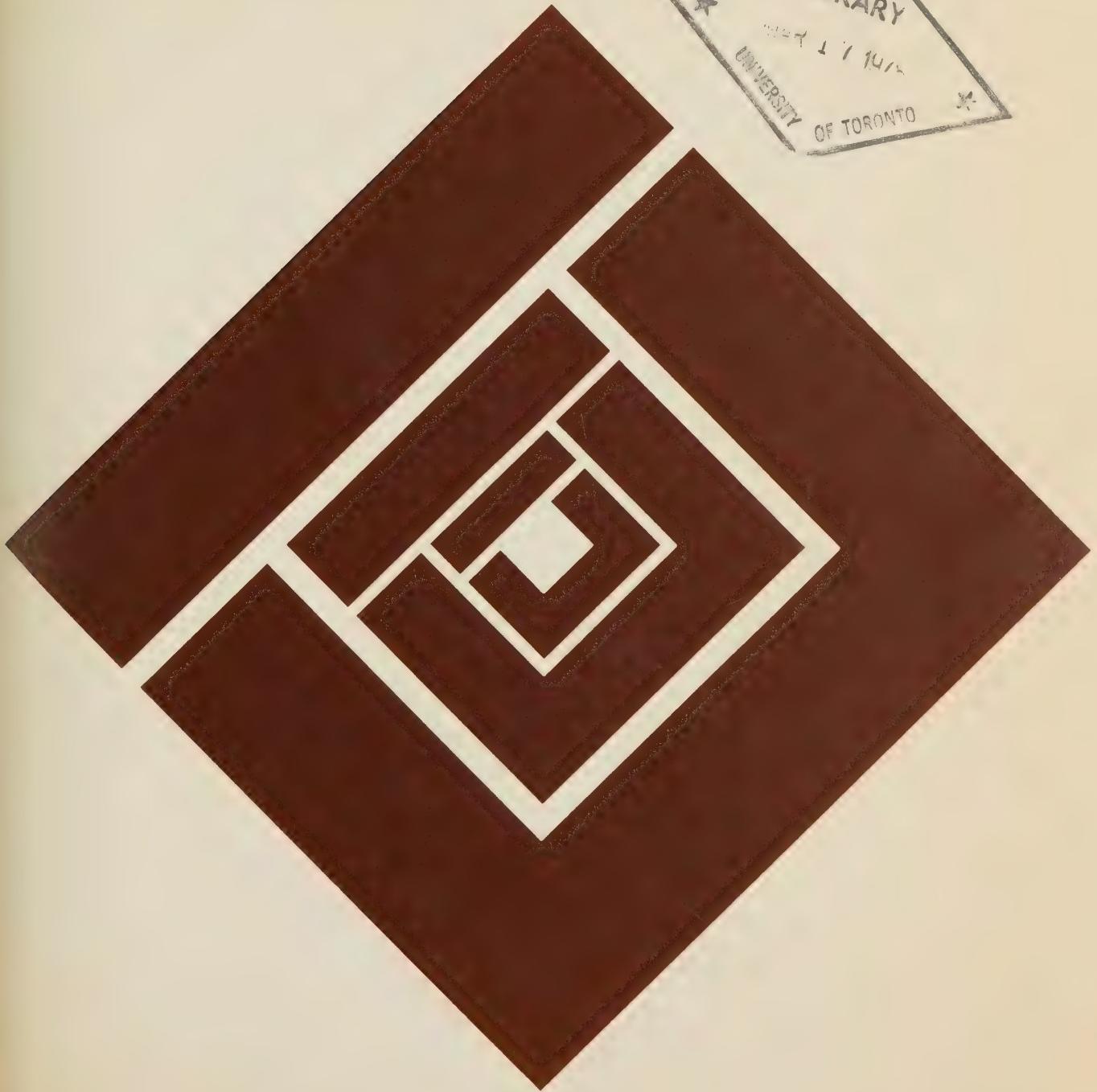
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Discharge for Union Activity – S- 79 – Effect of employer shutdown to avoid dealing with trade union – Effect of employees being on strike at time of shutdown – Whether Board will order enterprise to reopen – Whether union and employees may recover damages.

BEFORE: Arthur Haladner, Vice-Chairman and Board Members F.W. Murray and H. Simon.

APPEARANCES: *Martin Levinson, James Hayes and G. Thompson for the complainant; D.M. McFadyen, M.E. Wilson, John Withrow and T.E. Alderwick for the respondent.*

DECISION OF VICE-CHAIRMAN ARTHUR HALADNER; December 28, 1977.

I

1. This matter involves a complaint brought under section 79 of The Labour Relations Act arising out of the closure by the Academy of Medicine (the respondent) of its Call Answering Service Division. The Communications Workers of Canada (the complainant) contends that the closure, which occurred shortly after the commencement of a lawful strike, and without prior consultation or notice, was undertaken for anti-union purposes, in violation of sections 56, 58(a) and (c) and 61 of The Labour Relations Act. The complainant is seeking a number of remedies on behalf of itself and on behalf of twelve of the eighteen employees terminated as a result of the closure. These remedies include an order requiring the respondent to re-open its Call Answering Service and, in the alternative, an order that the respondent "make whole" the complainant for expenses incurred in its efforts to provide collective representation to the terminated employees. The complainant is also seeking an order that the individual employees be compensated in damages failing a Board order for re-opening.

II

2. The respondent, a non-profit corporation, operates a medical library and museum as well as a continuing medical education programme. It is funded entirely from fees received from its 2,500 member doctors.

3. Approximately forty years ago, the respondent commenced to offer a telephone answering service to its members. Over the years, the service expanded; and, as of June 9, 1977, the date of the closure, the Call Answering Service Division of the Academy of Medicine was subscribed to by about four hundred doctors, each of whom paid a monthly fee for the service. At that time, the respondent employed eighteen switchboard operators, fourteen on a full-time basis.

4. The respondent presently employs a number of office and clerical personnel. It also has employees working in its library. None of these employees has ever been represented by a trade union.

5. In July of 1976, a campaign was begun to organize the Call Answering Service

Employees. This campaign, which was initiated by the employees themselves, resulted in the complainant being certified on October 4, 1976 as bargaining agent for an all-employee unit of the respondent in its Call Answering Service. Certification was granted following the taking of a pre-hearing representation vote.

6. The evidence given by a number of employees, and former employees, of the Call Answering Service disclosed a sustained pattern of employer opposition to the efforts of the union and the employees to organize for purposes of collective bargaining. The Board accepts this evidence in its entirety. The employees gave their evidence in a straightforward and credible manner. By contrast, we found the general denials of the respondent's one witness to be less than credible.

7. Roberta Leroy was employed as a part-time switchboard operator from March, 1976 to October, 1976, when she left the respondent of her own volition. She is presently employed as the manager of computer control at a bank. Mrs. Leroy was involved in the organizing campaign from the beginning. On August 8, 1976, she received a telephone call from Betty Wilson, the Assistant Executive Director of the respondent and the supervisor of its Call Answering Service. During the course of that call, Miss Wilson stated she was going to have slips typed up which would read:

DO YOU WANT A UNION?
YES
NO

After Leroy indicated she did not believe it legal to interfere with a trade union, Wilson stated that anyone checking "Yes" would be replaced, to which Leroy replied that if this was done, she would have to be replaced. Wilson then stated that she had worked in a union shop and there was absolutely no way a union would get into the Academy of Medicine. Leroy's work schedule was altered after this telephone call; and on August 29, 1976, she was terminated by Wilson. Her letter of termination read as follows:

"After careful consideration and scrutiny of the call answering service schedules and records, it is apparent that it is no longer satisfactory to have the same number of employees in that department. In order to correct the situation further full-time operators have been employed. As a result of these organizational changes, your employment with the Academy of Medicine, Toronto Call Answering Service, will be terminated effective August 29th, 1976 at 7:00 p.m...."

8. The organizational changes referred to in Mrs. Leroy's letter of termination did not occur.

9. Helen Flannery, another union supporter, was also terminated by Miss Wilson on August 29th. Both terminations were the subject of a previous section 79 complaint before the Board (File No. 0994-76-U.) This complaint was ultimately settled, on terms which provided for the employees' reinstatement.

10. Eileen Martin worked as a part-time switchboard operator from December of 1972 until the date of closure. She is presently employed as director of communications for

an international hotel chain. Miss Martin received a similar call from Miss Wilson on August 9, 1976. During the course of that call, Wilson stated there would never be a union in the Academy since it was a non-profit organization.

11. Mary Filleul worked as a full-time switchboard operator from September of 1975 to September of 1976, when she resigned to continue her studies at a university. She is presently employed as assistant to the director of administration at a management consulting firm. Miss Filleul was also involved in the campaign to organize the employees of the Call Answering Service. On August 9, 1976, she was told by Miss Wilson that a union would not have a chance in the Academy and that Wilson would close the Call Answering Service first.

12. On August 23, 1976, Filleul was required to attend a meeting in the office of T.E. Alderwick, the Executive Director of the Academy of Medicine. During the course of that meeting, which was attended by Miss Wilson, Alderwick stated that if there was "trouble" at the Answering Service, he would close the service down. Following this meeting, Filleul went with Wilson to the latter's office where she was told that if the attempts to form a union did not stop, Wilson would recommend to the telephone committee that the service be closed and that they would not hesitate to accept her recommendation.

13. On August 26, 1976, Filleul overheard Wilson tell Angela Casserly, an employee who did not support the complainant, that the Academy was a professional organization; that it would not be dominated by a union; and that it would close the Answering Service if it came to that. These statements, which were made in the switchboard room, were also overheard by Rosanne Wilson, another former employee of the respondent. As has already been indicated, the Call Answering Service did, in fact, close on June 9, 1977.

14. Leroy, Filleul and Rosanne Wilson all testified that Wilson's attendance in the switchboard room increased dramatically after the first week of August, 1976 and that there was a significant change in her attitude toward supervision. New rules were implemented and applied in a discriminatory fashion. As well, known union supporters were subjected to surveillance and harassment, which got worse as time went on. Further, Wilson would frequently rail against the union in a loud voice. On one occasion, she stated: "The union is no good - TAS has it, and it has gone nowhere - it's worthless - you'll all be sorry if you have anything to do with it." On another occasion, she said words to the effect that if the union got in, it would be a detriment and benefits would be taken away.

15. The efforts of the respondent to oppose unionization did not end with the certification of the complainant. The respondent's practice in the past has been to give its employees a Christmas bonus. Eileen Martin and Rosanne Wilson were both told by Betty Wilson, after the complainant's certification, that she would not be approaching the doctors for Christmas contributions and that this was because of the union. In 1975, Mrs. Martin received about sixty dollars for Christmas. For Christmas, 1976, she received three or four dollars. In 1975, Ella Smith, another former employee of the respondent, received a Christmas bonus of over two-hundred dollars. In 1976, her bonus amounted to fifteen dollars and ten cents.

16. Roberta Keeley was hired in late October, 1976, several weeks after the complainant's certification. At the time of her hiring, she was told by Miss Wilson not to

discuss any private business with the other operators as they were conniving against her to bring in a union. In November, 1976, Ms. Keeley requested a change in her hours of work – from the day to the night shift. In order to obtain this change of shift, Keeley was required by Miss Wilson to sign a letter which Wilson dictated. This letter, which was produced by Wilson at the hearing, stated that Keeley did not want the union.

17. Ella Smith was employed as a full-time switchboard operator from December of 1974 until February 10, 1977, when she was terminated, allegedly for reasons of absenteeism. Mrs. Smith has a serious health problem. As a result of this problem, she was absent periodically from work during the period of her employment. In May of 1976, she was hospitalized for six weeks and did not return to work until September 20, 1976. On September 18th, two days before her return to work, she attended the pre-hearing representation vote where she was seen by Miss Wilson. Shortly before her termination, Smith was told by Wilson that, since she had made such a supreme effort to join the union, all consideration for her health would be disregarded.

18. Following certification, the respondent and the complainant engaged in approximately fourteen negotiating meetings, the last four in the presence of a Conciliation Officer. On March 31st, the parties met for the second last time. At this point in time, a number of issues remained outstanding. In an effort to reach an accommodation, Gerry Thompson, a staff representative of the complainant, and the chairman of its bargaining committee, indicated to Mr. Alderwick, the chief negotiator for the respondent, that all outstanding issues could be resolved but that the complainant would require some movement in the areas of wages and union security. (The union was seeking a dues check-off provision and a modest wage increase. The employer was opposed to the idea of check-off and had proposed a wage schedule whereby 70 per cent of the bargaining unit would receive increases ranging from 7½ cents to \$1.20 per day.) Mr. Thompson indicated further that if the respondent would accept its position on wages and union security, it would recommend acceptance to the membership and that if the respondent would accept its position on wages (and not union security) it would put the matter to a vote without recommending either acceptance or rejection. This represented a substantial concession on the part of the union which had also been asking for a cost of living allowance together with certain sick pay and health insurance benefits. Mr. Thompson gave evidence, which was not contradicted, that the difference between the respondent's proposal and that of the complainant; amounted to approximately forty-two hundred dollars over the life of the contract – one year – and, further, that the union's proposal represented an increase to each subscriber of approximately fifty cents per week.

19. On April 22nd, at a meeting called by the Conciliation Officer, Mr. Alderwick stated that the respondent was not prepared to increase the fees to the doctors and that it would not meet the complainant's demands. He made no effort to discuss matters further. On May 2nd, the parties were informed that the Minister of Labour did not consider it advisable to appoint a Board of Conciliation.

20. On Friday, May 20, 1977, fourteen of the eighteen Call Answering Service employees commenced a lawful strike. Apparently the respondent was able to keep the service operative for a time by using the four non-striking employees together with supervisory personnel. However, on May 25th, all service to the doctors was discontinued. Miss Wilson stated at the hearing that the switchboards were interfered with over the weekend of May

21st and 22nd. However, none of the complainant's witnesses was asked questions regarding this alleged interference. There was, moreover, no evidence that the union or the employees were in any way involved.

21. On June 9, 1977, the complainant was informed by the respondent's solicitors that the Call Answering Service Division had been terminated, effective immediately, and that Bell Canada had been ordered to remove the switchboards. That day, each employee was sent a letter, signed by Mr. Alderwick, advising that their services were no longer required. The switchboards, which had been rented from Bell Canada, were removed on July 4th, three days before the Board's initial hearing into this matter.

22. The Board was not informed as to when the decision to discontinue the Call Answering Service was arrived at. It is clear from the evidence, though, that the decision had been made by June 3rd. On that day, the subscribers were informed that the service would be terminated, and the respondent was making efforts to secure other employment for the non-striking employees.

23. On June 3rd, all Call Answering Service subscribers were sent a letter signed by Mr. Alderwick, the respondent's Executive Director. The letter read:

"Dear Doctor,

The present uncertainty of your Call Answering Service is now ending.

Following the emergency situation created by the strike, recording devices were placed in every subscriber's office. Since that time the Company who installed them, Interconnect Communications Ltd., has worked continuously on setting up a system for a medical answering service geared only for doctors. It is a service designed solely for your special needs.

It includes the use of Electronic equipment which can be used independently, or backed up by live operators, to provide you with the necessary immediate notification of emergency situations. In addition it can include the full use of a pager system thus employing 3 systems in one, and covering every possible contingency which may occur in your practice.

Costs in most instances will be no more than present charges, and in some cases less, and in addition will eliminate entirely the Bell Telephone cable charges, thus resulting in substantial savings for many doctors.

With your full and prompt co-operation with Interconnect Communications, a complete and new service for you can be in operation by next Wednesday, 8th June.

Interconnect Communications is sending a letter with details on obtaining this new and efficient service, so that your present service will not be interrupted in any way.

Because of the actions of the Union and the interference by persons unknown with our switchboards, it has become impossible for the Academy to carry on the Call Answering Service. This Service will be terminated twelve o'clock midday, Thursday, the 9th of June, 1977.

With grateful thanks for your recent sympathetic understanding of the situation and for all your past support."

24. Cynthia Swabie, a non-striking employee, was called as a reply witness by the respondent. She testified that on Friday, June 3rd, she was introduced by Miss Wilson to a Robert Stanway, a representative from Medi-Call Answering Service. She testified further that she and Gillian Sudan, another non-striking employee, were interviewed by Mr. Stanway the following Monday, June 6th, in the switchboard room of the Academy of Medicine and further, that this interview was arranged by Miss Wilson. The evidence establishes that Swabie, Sudan and Sally Moran, another non-striker, commenced employment as switchboard operators with Medi-Call on June 9th, the day the Call Answering Service was officially closed.

25. At no time during negotiations was the complainant informed that the respondent was contemplating discontinuing its Call Answering Service or that this might be a possible consequence of strike action.

26. The only witness called by the respondent to give evidence regarding the closure was Betty Wilson, the assistant to the respondent's Executive Director. Miss Wilson offered no explanation for the decision to permanently discontinue operations rather than to state that the Call Answering Service could not be kept operating during the strike and that it had been decided, at an emergency meeting of the Board of Directors, that the Answering Service could no longer provide a satisfactory service to the doctors. There was no explanation offered as to why the respondent could not have re-opened at some future date. It should be noted here that the "Interconnect System" referred to in Mr. Alderwick's letter to the subscribers was described by Miss Wilson as a temporary replacement measure. Miss Wilson did not say when the emergency meeting of the Board of Directors occurred. She did say, however, that she had no authority to order the Answering Service closed and that only the Board of Directors, of which she was not a member, had that authority.

27. Miss Wilson gave evidence, which the Board accepts, that the respondent has no intention of re-opening its Call Answering Service Division.

III

28. The evidence establishes that, during the period of the complainant's organizing drive, the respondent, through its Assistant Executive Director, engaged in a persistent and flagrant pattern of anti-union conduct. This conduct, which included threats to close down if the complainant was successful, as well as a number of discharges and other discriminatory employment practices, was still very much in evidence in the post certification period. The Board, having regard to this clearly defined pattern of anti-union activity, must conclude that the respondent had no intention from the outset of concluding a collective agreement with the union and that it was simply going through the motions of collective bargaining in the hope that the employees, who had already been subjected to considerable

intimidation and coercion as a result of their union activities, would eventually become disengaged by the union's lack of success and withdraw their support.

29. It is against this background that the closure of the Call Answering Service must be examined. The question is whether the closure of the Call Answering Service represents a continuation of the respondent's anti-union activity or whether it can be justified on business grounds. It does occur that an employer, faced with demands on the part of a union which it cannot afford to meet, will decide to shut down rather than subject itself to a prolonged strike without reasonable prospect of securing a settlement on terms which will allow it to remain economically viable. A closure in such circumstances does not, of course, constitute an unfair labour practice, being for legitimate business reasons. In this case, however, there was no evidence that the closure of the Call Answering Service was motivated by legitimate business considerations. Indeed, counsel for the respondent stated that the Answering Service was not closed because of an inability to meet the complainant's demands, demands which were in no respect excessive or unreasonable.

30. Not only did the respondent fail to come forward with evidence that the closure of its Call Answering Service Division was motivated by legitimate business considerations, it failed to produce anyone with decision-making authority to explain the justification for the closure. The only witness called by the respondent was Betty Wilson, a person who, by her own admission, had no authority to order the Answering Service closed, although it is to be noted that Miss Wilson held herself out to the employees as having power to make effective recommendations in that regard. T.E. Alderwick, Miss Wilson's immediate superior and the person who notified the employees of their terminations, was not called to give evidence before the Board. Mr. Alderwick, who was also the chief negotiator for the respondent in its dealings with the complainant was, however, present throughout the entire course of the Board's hearing into this matter. The failure of the respondent to come forward with an economic explanation for the closure is particularly troublesome in light of the burden placed upon it under section 79 (4a) to prove that it did not act contrary to the Act. Miss Wilson testified that the Call Answering Service was discontinued because the strike made it impossible to carry on, a "reason" which is also contained in Mr. Alderwick's letter of June 3rd to the subscribers. If this means, as counsel for the respondent seemed to be suggesting, that his client was not prepared, on ideological or philosophical grounds, to tolerate a disruption of its operation, irrespective of the effect of that disruption on its economic viability, it is tantamount to a refusal to recognize the right of employees to engage in meaningful collective bargaining. (See paragraph 36.)

31. The conclusion appears to be inescapable that the respondent, having failed in its earlier efforts to oppose union representation of its employees, simply used the strike as an excuse to shut down, and thereby rid itself, once and for all, of the union and its supporters. The timing of the closure, following as it did, so closely upon the heels of a strike lends further support to this conclusion. It should be emphasized that the Call Answering Service had operated successfully for forty years. The fact that the union was never advised during negotiations that a possible consequence of strike action could be a permanent cessation of operations is another source of concern. If the respondent's bargaining position as of April 22nd was *bona fide*, and if it had any wish to avert a strike, it seems odd that the union would not have been advised of this contingency.

32. The respondent's status as a non-profit organization is also of significance. That

this is only the second case in which an employer has been accused of discontinuing an operation in contravention of The Labour Relations Act, is no accident (see para. 33.) While the jurisprudence of the Board is replete with examples of employers who will go to almost any lengths to avoid unionization of their businesses, rare indeed is the employer who will close down rather than operate with a union. Employers, motivated as they are by their own economic self interest, do not normally engage in economic suicide. By contrast to the employer who is in business to make a profit, the respondent could easily afford to jettison its Call Answering Service Division for, as has been demonstrated, it was not difficult to obtain a telephone answering service from an outside source. Viewed from this perspective, the closure of the Call Answering Service Division can be seen as a small price to pay for an employer bent on avoiding unionization of any aspect of its business. The Academy has employees working in other Divisions who have never been represented by a trade union. In the circumstances of this case, the closure of the Call Answering Service would have been regarded by those other employees as a vivid illustration of what might happen to them if they opted in favour of trade union representation in the future. The other employees of the Academy are employed in services which were described by its counsel as "essential." The Call Answering Service was described by counsel as an "optional benefit" to the membership.

33. The evidence in this case should be contrasted with the evidence in *Webster and Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780, the only previous case involving a discontinuance of operations during a strike. There, the employer, a manufacturer of steel rope wire, adduced evidence that it had made a conditional decision to close, a decision which became final as a result of the economic effect of the strike. In finding that the explanation advanced by the employer was both legitimate and substantial, the Board noted that it had previously entered into a collective agreement with the union; that it had made a *bona fide* offer of a wage increase based on increased productivity, and that the decision to close was not accompanied by any future benefit to the employer arising from non-unionism. There was no evidence in *Webster* of any anti-union conduct or animosity.

34. For the foregoing reasons, the Board finds that the closure of the Call Answering Service Division of the Academy of Medicine was motivated in whole, or in substantial part, by anti-union considerations. The Board finds that the closure was intended to get rid of the complainant, to retaliate against the Call Answering Service employees for their selection and support of the complainant, and to discourage unionization in other Academy Divisions. This conduct constitutes a serious violation of section 56 of The Labour Relations Act, which prohibits, among other things, employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union; section 56(a), which provides that an employer may not refuse to employ or continue to employ a person because the person was or is a member of a trade union or was or is exercising any other rights under the Act; and sections 58(c) and 61 of the Act, both of which prohibit the intentional use of intimidation or coercion by an employer to compel an employee to refrain from becoming, or to cease to be, a member of a trade union.

IV

35. We recognize that our conclusion differs from that of the United States Supreme Court in *Darlington Manufacturing Co.*, (1965) 380 U.S. 263; 58 LRRM 2657. In that case, it was held that an employer does not commit an unfair labour practice under the National

Labour Relations Act by permanently shutting down its entire operation, even if the shutdown is motivated by union animosity. *Darlington* can be distinguished on the ground that the closure of the Call Answering Service was motivated, in part, by a desire to discourage unionization in other Academy divisions. (The Supreme Court was of the view that the closing of one plant of a multi-plant enterprise – the situation in *Darlington* – is an unfair labour practice if motivated by a purpose to “chill” unionization in any of the remaining plants.) The Board finds, however, that the *Darlington* decision is of no precedential value in Ontario since it is based on a statute, which, in the opinion of the United States Supreme Court, allows an employer to terminate its entire business for whatever reason it pleases.

36. There is no provision of The Ontario Labour Relations Act which grants employers, who completely discontinue business, immunity from unfair labour practice charges. Section 68, the only provision which speaks directly to the issue, leaves no doubt that the unfair labour practice sections of the Act apply to a permanent, as well as a temporary, closure. It states:

“Nothing in this Act prohibits any suspension or discontinuance *for cause* of an employer’s operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.”

(Emphasis added)

There is nothing, moreover, in the general scheme of the Act which would suggest that an employer may, with impunity, terminate its entire business rather than operate with a union. The Labour Relations Act is based on the policy (embodied in the preamble) that collective bargaining, with the right to strike and lock-out, in the event of an ultimate impasse, is the preferred method of settling the terms and conditions of employment between employers and employees in the Province. To ensure the achievement of this policy, the Act establishes procedures for the acquisition of bargaining rights and mandates certain practices and conduct to encourage and regulate the collective bargaining relationship once established. The unfair labour practice sections of the Act, taken together, constitute a general prohibition against any kind of anti-union conduct. These sections are designed to protect the basic right of employees to join a trade union and to participate in its lawful activities, as well as the right of unions to organize and represent employees, free from employer interference. It is difficult to conceive of conduct more destructive of these rights than a permanent closure of a business, based not upon legitimate business considerations but upon an employer’s simple refusal to operate with a trade union. If the Board were to hold that such conduct is permissible under the Act, it would be giving carte blanche to employers, such as the respondent, with a “discontinuance” capacity to frustrate the policy which the Statute so clearly prescribes. The respondent’s threat to close its Call Answering Service if the union was successful constitutes a clear violation of The Labour Relations Act. It would be strange indeed if the total effectuation of that threat – the permanent discontinuance of its Answering Service – did not also constitute a violation. It would be stranger still if an employer violates the Act by firing some of its employees for their union membership or activity, but not by firing them all.

37. The conclusion that an employer may not, under The Labour Relations Act, close down with impunity is hardly a startling one. Ontario legislation in the field of busi-

ness regulation imposes specific restrictions on the right of business entities to dissolve. These restrictions are based on the premise that a business should not escape liability for obligations incurred before or in the course of dissolution. For a similar reason, The Labour Relations Act does not permit an employer to insulate itself from the prohibitions against anti-union conduct by simply discontinuing operations.

38. It should be stressed that the Board's decision in this case is not intended to interfere in any way with the right of an employer to "lock-out" its employees in order to bring economic pressure to bear in the context of negotiations. Once the mandatory conciliation process has been exhausted, an employer is perfectly entitled to shut down with a view to compel an agreement on terms favourable to it. In this case, however, the employer has not purported to have locked out its employees for a collective bargaining purpose. The evidence of the respondent is that it has permanently closed down its Call Answering Service. By so doing, it has foreclosed the possibility of concluding an agreement with the complainant.

39. Employees who go on strike in this Province do not, as was argued by counsel for the respondent, strike at their absolute peril. Strikers in Ontario run the risk that their strike will be unsuccessful in securing the benefits they desire and, even in some cases, that the economic effect of the strike may make it impossible for the employer to operate at a profit in the future. That was, in part, the situation in *Webster and Horsfall*. Ontario strikers, however, do not run the risk that their employer will discontinue operations simply because it is unwilling, in principle, to operate with a union. Section 1(2) of the Labour Relations Act expressly preserves the status of strikers as employees. In addition, section 64 of the Act provides employees engaged in a lawful strike with a right to be reinstated in employment upon making within six months of the commencement of the strike an unconditional application to return to work. It states:

"Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection 2, reinstate the employee in his former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising or having exercised any rights under this Act."

The exceptions contained in subsection 2 of section 64(1) are of no application where, as here, the employer shuts down for an anti-union purpose. Section 64(2)(b), the sub-section which creates an exception in the case of discontinuance of an employer's operation(s), expressly requires that the discontinuance be "for cause."

V

40. We turn now to the question of the appropriate remedy for the respondent's unfair labour practices.

41. Prior to 1975, access to the Board's general remedial authority, under section 79 of the Act, was restricted to individual employees. The union and the employer, the primary

parties to the collective bargaining relationship, were generally required to enforce their respective rights by way of a punitive action before the Provincial Courts. As a result of the 1975 amendments to The Labour Relations Act, the Board's remedial authority is now available to any complainant, whether an individual, employer or union. Moreover, as was noted in *The Ottawa Journal* case, [1977] OLRB Rep., June 309, section 79, as amended, provides the Board with broad powers to provide relief where there has been a breach of the Act. Section 79 confers upon the Board jurisdiction to issue both negative directions, (i.e., cease and desist orders) and affirmative directions in order to compel compliance with the Act and to rectify violations. Under section 79, the Board has also been given express authority to award damages, a power which is expressly *not* restricted to situations where the Board orders reinstatement. Section 79 provides in material part as follows:

“S.79 (4)... where the Board is satisfied that an employer, employers' organization, trade union, council of trade unions, person or employee has acted contrary to this act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of; or
- (b) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) in order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally.”

42. Counsel for the complainant contends that the only effective remedy in this case is one which requires the respondent to re-open its Call Answering Service. No other remedy, counsel says, will rectify the respondent's violations. Counsel noted that the evidence before the Board disclosed no significant impediment to a re-opening. There is no capital equipment which has been sold. Moreover, the required equipment, the switchboards, were removed after the complaint was filed and, in any event, can be reinstalled without great cost.

43. While section 79 clearly contemplates that the Board will develop and apply new remedies, where appropriate, the Board's creative function must be carried out within the practical, as well as the statutory, limits of its remedial jurisdiction. An overreaching of these limits in a particular case may result in a general weakening in the efficacy of the

Board's remedial orders, orders which depend to a very large extent upon voluntary compliance. The language of section 79 may be wide enough to permit an order requiring the respondent to re-open. The Board has concluded, however, that an order for re-opening would not be an appropriate exercise of its remedial authority. A mandatory order compelling an employer to operate a service which it does not wish to operate, albeit for a prohibited reason, would give rise to obvious difficulties of enforcement – difficulties which, in the long run, could only serve to weaken the efficacy of the Board's remedial orders.

44. The impracticality of an order for reopening no doubt explains the absence of any precedent for such relief either in the United States or Canada. While there have been cases involving unfair labour practice closures in other jurisdictions, in none of those cases has the employer been ordered to reinstitute an operation which has been wholly and permanently discontinued. *Serv-U Stores, Inc.*, (1976) 93 LRRM, 1033, *Plastic Transport Inc.*, (1971) 78 LRRM, 1185, and *George Lithograph Co.*, (1973) 83 LRRM, 1402, the authorities referred to by counsel, all involved situations where the work performed by the discontinued operation was continued in some other part of the employer's enterprise. That was essentially the situation in *Humpty Dumpty Foods Limited*, [1977] OLRB Rep. 401, a recent decision of this Board involving a runaway shop.

45. To conclude that the Board will not require an employer that has shut down in violation of The Labour Relations Act to re-open is not, however, to conclude that an unlawful closure should be without a remedy. While there are, as this case illustrates, limits to the capacity of the Board to deal effectively with those who would so fundamentally contravene the Act, it can at least ensure that those injured by such unlawful conduct are compensated in damages. An award of damages in this case would serve the additional function of providing some disincentive for similar conduct in the future and, in this way, help to support the public interest in encouraging the practice and procedure of collective bargaining.

46. The respondent's unfair practices have had an injurious effect on both the employees and the union. Dealing first with the injuries suffered by the union, counsel for the complainants request that the Board order the respondent to "make whole" the union for the resources expended in its efforts to provide collective representation to the employees of the respondent's Call Answering Service – efforts which have been rendered fruitless by the respondent's illegal closure of that Division. Counsel pointed out that there is authority for such an exercise of remedial authority in several jurisdictions. (See, for example, in the U.S. (*Tidee #1*), (1970) 1426 F. (2d) 1243 (USCA District of Columbia); and in Canada, *Robinson Little & Co. Ltd.*, letter decision dated March 15, 1976; November 22, 1976; and *Kidd Bros. Produce Ltd.*, [1976] 2 Canadian LRBR 304, two recent decisions of The British Columbia Labour Relations Board, which have granted "make whole" orders. In the former case, the employer, an owner of a chain of retail food stores, shut down its "Kamloops" operation after the management of that store failed in its efforts to rid itself of a newly certified union.) Counsel also noted that the Board, itself, has indicated that damages will be available to a union in an appropriate case. (See the *Ottawa Journal* case [supra] where an award was not allowed since the union was without clean hands and tardy in seeking Board relief.)

47. In this case, the illegal conduct of the employer has completely thwarted the organizational efforts of the union and deprived it of its statutory right to represent and bargain on the employees' behalf. There has been no allegation that the union has acted improperly in any way. Nor does the evidence disclose any impropriety. The union filed this complaint immediately after the occurrence of the conduct complained of.

48. The Board, having regard to the seriousness of the respondent's unfair practices, to the impracticality of making order for rectification, and to the fact that the employer is continuing in operation other aspects of its enterprise, has concluded that this case is an appropriate one for the granting of a "make whole" order. The Board orders the respondent to reimburse the union for all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights. Such expenses are to include the costs of proceedings before the Board, proceedings which would not have been necessary but for the unfair labour practices of the respondent. While this part of our order is equivalent to an award of costs, it should not be taken as signalling a retreat from the Board's general practice of not awarding costs as against an unsuccessful party. This is a case, however, where the employer's contraventions of the Act are so serious that the resulting legal costs to the union cannot be ignored. Moreover, the rationale underlying the Board's practice of not awarding costs – that of not identifying a "winner" and a "loser" – is of no application where, as here, the conduct of the employer has made it impossible for the parties to live together in the future. (See *Repac Construction and Material Limited*, [1976] OLRB Rep. Oct. 610.) It should be stated, however, that the Board has not attempted in this decision to exercise any general procedural power to award costs. What the Board has done is exercise its remedial authority under section 79(4)(c) of the Act so as to, as nearly as possible, restore the union to the position it was in prior to the respondent's unfair practices. Given the impracticality of an order for rectification, full compensation, including all reasonable legal expenses, ought to be awarded to the union.

49. Compensation must also be considered for the discharged employees. What the employees have lost is their employment status. This status has been lost by reason of the illegal closure of their place of employment. As stated, employees in this Province do not run the risk that their employer will close down simply because it is unwilling in principle to operate with a union. The Labour Relations Act contemplates the continued status of strikers as employees and provides employees on a lawful strike with a right to be reinstated in their former positions upon the making of an unconditional application to return to work, within six months. While no such applications were made in the instant case, the Board finds that, because the respondent had by June 9th permanently discontinued its Call Answering Service, applications for reinstatement by the employees would have been fruitless and were therefore unnecessary.

50. Damages resulting from a loss of employment status cannot, of course, be measured with precision. However, since the uncertainty of the measurement is directly attributable to the aggravated character of the violation, the employer should not be able to avoid an assessment on that ground. The Board must make its best estimate of the value of the employees' loss in all the circumstances of the case.

51. To compensate the employees of the Call Answering Service for the loss of their employment status, the Board has determined that the respondent should pay to each of the employees listed on Schedule "A" a sum of money equivalent to the amount they would have earned from June 9, 1977 – the date of the closure – until September 9, 1977, such compensation to be computed on the basis of the employees' respective wage rates as of June 9th. This assessment, which is designed to afford the employees a reasonable period in which to secure alternate employment without loss of income, is based on the assumption that the respondent would not have discontinued its Call Answering Service Division for cause within the foreseeable future. The evidence is that the respondent had operated its

Call Answering Service for forty years, and that the service was an expanding one. It must, therefore, be assumed that the Call Answering Service would have continued had not the employees chosen to exercise their rights under the Act to join a trade union and to participate in its lawful activities. To ensure that no employee receives a windfall as a result of the employer's unfair practices, those employees finding alternative employment during the period in question, and the evidence indicates that there are some, will have their damages reduced accordingly.

VI

53. In conclusion, it should be emphasized that these awards of compensation to the union and the employees are necessary in order to provide an adequate remedy for what are very serious contraventions of The Labour Relations Act – contraventions which have made the traditional remedial orders inadequate and/or impractical. The order for compensation in respect of the discharged employees is all the more appropriate in light of the respondent's inability to offer the employees substantially equivalent employment in other Academy divisions and in light of the respondent's efforts to secure such employment for the employees not supporting the union.

52. The Registrar is directed to list this matter for further hearing in order to determine the amount of compensation owing to the union and the employees.

DECISION OF BOARD MEMBER H. SIMON:

1. I concur with the Vice-Chairman that the employer's closing down of its answering service was done in flagrant violation of the Act.

2. I am, however, unable to concur with the remedy granted to the individual employees.

3. Even if I were to accept that the difficulties of ordering an employer to re-open are such as to make that remedy unworkable I cannot therefore agree that the employees compensation should be limited to three months pay.

4. The obvious make whole order for the employees is to award them their full pay until the date of this decision and then, since that date will in fact become the first date on which they will receive a legal notice that their employment is to be terminated, albeit for an illegal reason, for a further notice period of two months. This is, at the very least, what they lost by the employers unconscionable action. The fact that they were on strike at the time of the closure is irrelevant unless this Board is prepared to deny employees their right to strike by suggesting that if they do so they are somehow or other condoning any illegal acts perpetrated upon them.

5. Even were this remedy adopted the fact remains that these employees who gave in to the employers illegal intimidation and worked during the strike presumably continue, because of the employers efforts, to enjoy full and secure employment while those who engaged in activity that this Board has a duty to protect are now out on the street and are already without some three months wages (six months having gone by) unless they have been fortunate enough to secure subsequent employment.

MR. F. W. MURRAY'S DISSENTING DECISION WILL FOLLOW.

1048-77-U; 1049-77-U Milk and Bread Drivers, Dairy Employees, Caterers and Allied Workers, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant), v. **The Becker Milk Company Limited**; and Ind-Ex Distributors Ltd. (Respondents).

S-79 – Effect of refusal by employer to reinstate strikers – Effect of section 64 right to reinstatement.

BEFORE: M.G. Picher, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *Harold F. Caley, Stewart Powers and Bill Sackfield for the complainant; John P. Sanderson and Aarui Magi for the respondents.*

DECISION OF M.G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER O. HODGES; December 21, 1977.

1. The name: "The Becker Milk Co. Limited" appearing in the style of cause of this application (File No. 1048-77-U) as the name of the respondent is amended to read: "The Becker Milk Company Limited."
2. Having regard to the agreement of the parties these complaints are hereby consolidated.
3. These complaints, filed under section 79 of The Labour Relations Act, bring to the Board parties that have recently ended a long and difficult strike.
4. The union now alleges that the employers, The Becker Milk Company Limited (hereinafter referred to as "Becker's") and its subsidiary Ind-Ex Distributors Limited ("Ind-Ex"), have breached the Act by refusing to reinstate 30 striking workers who sought to return to their former employment under the protection of section 64 of the Act. It asks the Board to reinstate the employees with compensation for loss of wages and benefits. At the hearing the parties were agreed that should this Board find a violation of the Act we should so declare and remain seized of the complaint to deal separately with the remedy should the parties be unable to reach any agreement.
5. The facts are not in dispute. Becker's produces dairy products at its plant in Metropolitan Toronto. Ind-Ex, its wholly owned subsidiary, delivers Becker's products from its plant to the retail stores where they are sold. The complainant union represents separate bargaining units of Becker's production employees and the truck drivers employed by Ind-Ex.
6. Both employers were struck by the union in the spring and summer of this year.

Becker's employees began a lawful strike on March 31, 1977. Some four or five days later the truck drivers at Ind-Ex walked off the job, although within the scheme of the Act their strike did not become lawful until approximately June 12, 1977.

7. Negotiations to end the strike and conclude an agreement took place up through the week of September 5, 1977. Those negotiations had the assistance of a mediator appointed by the Minister of Labour. On Friday, September 9, 1977, in the presence of both the mediator and the union's bargaining representatives, the employers' negotiators advised the union of the employers' firm position that, whatever settlement might be reached, the grievors would not be reinstated. The reason for the employers' position was that all of the grievors, with a few exceptions not material to this case, had been charged under the Criminal Code or the Highway Traffic Act as a result of events related to the strike. The trade union's bargaining committee responded that the union could not and would not bargain away any reinstatement rights that the grievors might have under section 64 of The Labour Relations Act. At that meeting management tabled a draft collective agreement on behalf of each employer as the proposed basis of a final settlement of both strikes. The union thereafter called general meetings of its members in each of the two bargaining units to consider its response.

8. Those meetings were held on Sunday, September 11, 1977. Union counsel was present at both meetings and at both meetings the draft collective agreement and the plight of the grievors were considered. With the advice of counsel at each of the two meetings the membership did not vote to accept or reject the employers' draft collective agreement and thereby decide whether to end the strike and return to work. Rather, at each of the meetings the membership resolved, by a majority, to delegate the entire power of decision in that regard to the executive officers. Thus it gave them the sole power to decide whether the employers' offer would be accepted or rejected and to decide when that decision would conclusively be made.

9. This it did with one purpose in mind: the reinstatement of the grievors. Under the advice of counsel the officers and members of the union directed their minds to how they could best protect the interests of the grievors. They decided that the wisest course was to avoid any decision to end the strike by signing a collective agreement until the grievors were able to deliver to the employers unconditional written applications for reinstatement under section 64 of the Act. They believed that if they did otherwise recall to their jobs under that section of The Labour Relations Act could be lost to those employees.

10. The union then carried out a series of steps according to plan. At 9:00 a.m. the next morning, Monday, September 12, 1977, unconditional applications for reinstatement in writing were delivered to the employers by or on behalf of each of the grievors. They were all signed by the grievors or by a union officer on their behalf and worded:

"Dear Sirs:

I, the undersigned, hereby make an unconditional application in writing to return to work pursuant to Section 64 of The Labour Relations Act (Ontario).

Yours very truly,"

11. At approximately 11:00 a.m. that morning, when the union was advised that the letters requesting reinstatement had been delivered, its executive officers met and, pursuant to the powers delegated to them, decided to lift the strike and accept the terms of settlement offered by the employer on the previous Friday.

12. At 1:30 p.m. of the same day Mr. Bill Sackfield, the union's representative, went to the offices of the employers to advise them that the union accepted their offer. A collective agreement was then formally executed by both parties with Mr. Sackfield signing for the union. Since that date the employers have been implementing the recall of their employees; they have not, however, wavered from their refusal to reinstate or recall any of the grievors. And that is so notwithstanding that some of the grievors have been tried and acquitted or had the criminal charges against them dropped.

13. Counsel for the employers submits that the critical fact is that the strike ended at the union meetings on Sunday, September 11, 1977. He argues that it is then that the employees' refusal to work in fact ended. He asks the Board, in effect, to look behind the union's procedures and pierce what he calls the veil of formalities that the union adopted to structure events to defer the end of the strike and protect the grievors. The employers submit that at the time the written requests for reinstatement were handed to them the strike was over in the mind of the union and the grievors were therefore not entitled to the protection of section 64 of the Act. In that circumstance, say the employers, they were under no statutory obligation to reinstate the grievors and this complaint should therefore be dismissed.

14. Alternatively, counsel for the employers argues that if the Board should find that section 64 did apply and that there was a right to reinstatement, we should exercise our discretion to decline any remedy under section 79 of the Act. Firstly, he submits that no remedy should issue in respect of the grievors who are employees of Ind-Ex because they engaged in an unlawful strike from early April until mid June. Secondly, as regards all of the grievors, he says that the Board should take into account the circumstances surrounding the reasons for the employers' refusal to reinstate and find in the laying of charges grounds to refuse a remedy under The Labour Relations Act.

15. Section 64 was introduced into the Act in 1970 (The Labour Relations Amendment Act, 1970, (No. 2) S.O. 1970 c.82 s.25). It provides:

64. (1) Where an employee engaging in a lawful strike makes an unconditional application in writing to his employer within six months from the commencement of the lawful strike to return to work, the employer shall, subject to subsection 2, reinstate the employee in his former employment, on such terms as the employer and employee may agree upon, and the employer in offering terms of employment shall not discriminate against the employee by reason of his exercising or having exercised any rights under this Act.

(2) An employer is not required to reinstate an employee who has made an application to return to work in accordance with subsection 1,

(a) where the employer no longer has persons engaged in performing

work of the same or similar nature to work which the employee performed prior to his cessation of work; or

- (b) where there has been a suspension or discontinuance for cause of an employer's operations, or any part thereof, but, if the employer resumes such operations, the employer shall first reinstate those employees who have made an application under subsection 1.

16. This case raises in a general way the question of the rights of striking employees. What must be determined is the extent to which section 64 has increased the protection provided to striking employees beyond what previously existed. At common law the striking employee could be viewed as having repudiated his individual contract of employment, and therefore be liable to summary dismissal. That common law position, however, was altered by statute. The Ontario Labour Relations Act, since its inception, has provided that employment status for employees continues during a strike. Section 1(2) of the Act reads as follows:

1(2) For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for his employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

The extent of the protections that flow from this provision must be examined in order to determine the full implications that flow from the subsequent enactment of section 64.

17. The Supreme Court of Canada closely considered the meaning of section 1(2) in *C.P.R. v. Zambri* (1962), 34 D.L.R. (2d) 654. It held that where a collective agreement has expired and employees go on strike an employer may not consider the employment contract as at an end and effectively dismiss the employees because they are engaging in a strike. Any attempt to do that would be a refusal to continue to employ the persons in question because they are exercising rights under The Labour Relations Act, something that is clearly contrary to section 58(a) of the Act. (See also *Re Allanson* (1971) 20 DLR (3d) 49 (C.A.), where the Ontario Court of Appeal applied section 1(2) of the Act to find that strikers were within the class of persons intended to be benefited by a trust executed in favour of "present and retired employees" of the settlors' company). Another practical effect of section 1(2) is to preserve to employees on strike the right to participate in representation votes that may be taken pursuant to an application for certification or an application for a declaration terminating bargaining rights made under the Act. (*Brooker Trade Bindery Ltd.* [1973] OLRB Rep. Dec. 612).

18. Employment status is not, of course, preserved forever by section 1(2). As the Board recognized in *Brooker Trade Bindery* following the reasoning of the Court in *Re Allanson*, there is nothing in section 1(2) to counter the reasonable conclusion that a striking employee who has conclusively demonstrated an intention to take permanent employment with another employer has voluntarily forfeited his status as an employee of the struck employer. In this regard the whole course of conduct of the striker must be examined. A striking employee, no less than any employee, may quit his employment (*J. McLeod and Sons Limited* [1969] OLRB Rep. Dec 1100). By striking he does not forfeit his ability to formally

resign nor does he achieve immunity from a dismissal that would not be an unfair labour practice.

19. Ordinarily when a strike is successful the striking employees return securely to their jobs as a result of the negotiated settlement. But not all strikes are won. When a strike has ended and has ended in failure, what are the legal rights of the unsuccessful strikers with respect to their jobs, particularly when those jobs have been filled by replacements hired during the strike?

20. It is an accepted principle of industrial relations law in Ontario that a struck employer has the right to protect and continue his business. He may try to do that in a number of ways. He may seek to contract-out the work of the struck bargaining unit. He may re-arrange the work of non-striking employees, insofar as their employment contract allows. He may press management staff into work on the shop floor on a fill-in basis. Or he may hire replacements. Thus when a strike has ended in failure and his union has been unable to negotiate a return-to-work clause, the unsuccessful striker may find that his job is held by a replacement. Does that fact change his status as an employee under The Labour Relations Act?

21. It was apparently once thought in both Canada and the U.S. that while a strike itself would not terminate an employee's status (because of the protection of section 1(2) of The Labour Relations Act and the similar provision in section 2(3) of The National Labour Relations Act) the separate act of hiring a replacement by the employer during the strike did have the effect of ending the employment status of the striker who was replaced. (See *Royal Commission Inquiry Into Labour Disputes*, the Hon. I.C. Rand, Aug, 1968 at p. 24; *Bartlett-Collins Co.* 110 N.L.R.B. 395 (1954); *Atlas Storage Division v. N.L.R.B.* 112 N.L.R.B. 1175 (1955), enforced sub. nom. *Chauffeurs Teamsters & Helpers Local No. 200 v. N.L.R.B.* 233 F. 2d 233 (7th Cir 1956); *Brown and Root Inc.* 132 N.L.R.B. 486 (1961), enforced, 311 F. 2d 447 (8th Cir. 1963).

22. That limited interpretation of section 1(2) was criticized by the Rand Royal Commission as being in unjustified disregard of the rights and benefits of employees accumulated over years of service. According to the Commission that view ignored the fundamental purpose of the section by placing the economic life of the employee at the arbitrary will of the employer. To maintain that the act of hiring replacements would extinguish all of the vested rights and the very employment status of strikers would, in the words of the Report, "reduce the validity of a strike to mockery".

23. Whatever uncertainty there may have been in this province with regard to that issue was resolved one year after the tabling of the Rand Report. In its decision in *McLeod*, (*supra* at p. 1104) the Board expressly rejected the contention that the hiring of a replacement terminated the employment status of a striking employee that is protected by section 1(2). Similarly, in the United States the National Labour Relations Board and the courts have corrected the course of earlier decisions and have interpreted section 2(3) of the National Labour Relations Act as preserving the status of strikers as employees notwithstanding the hiring of replacements by the employer during the strike. (*N.L.R.B. v. Fleetwood Trailer Co.* 389 U.S. 375 (1967), enforcing 153 N.L.R.B. 425 (1965); *Laidlaw Corp v. N.L.R.B.* 414 F. 2d (7th Cir. 1969) and see generally Martin, "The Rights of Economic Strikers to Reinstatement: A Search for Certainty" (1970) Wisc. L. Rev. 1090).

24. But what is the extent of an employee's right under section 1(2)? More particularly, does the employee who returns to work after a strike have a right to "bump" a replacement and assume his old job? In Ontario that will depend on whether he returns under the protection of section 64 of the Act.

25. Under The Labour Relations Act strikers continue to be employees and they are not to be discriminated against for having exercised their right to strike. When a strike that lasts beyond six months ends in failure there may be existing job vacancies that subsequently arise by the departure of replacements or the creation of new jobs. The qualifications of the former strikers to fill those jobs may in many cases be inferred from their original hiring and past employment. An employer who refuses to give those jobs to returning employees qualified to fill them commits an unfair labour practice to the extent that the refusal amounts to a calculated penalizing of a group of employees for having exercised their lawful right to strike. (cf. *Fleetwood Trailer Co.; Laidlaw Corp. (supra)*). The refusal of an employer to put employees back to work in those circumstances is no less a breach of the Act than any attempt to discharge them outright for engaging in the right to strike (cf. *Webster v. Horsfall* 69 CLLC ¶16,050). But, subject to whatever better rights their union can obtain for them, that appears to be the limit of the protection that strikers in that circumstance can expect. An integral feature of the balance of power in collective bargaining is that strikers who return to work without the protection of section 64 of the Act cannot, as a legal right, displace replacements who were hired in their stead.

26. Against that background the rights given to strikers by section 64 of the Act become more clear. Three conditions must be met to bring that section into effect:

- 1) The employee must be returning to work after engaging in a lawful strike.
- 2) He must make an unconditional written application to return to work.
- 3) The application must be made within six months of the beginning of the strike.

Subject to the exceptions described in subsection (2) of section 64, when these conditions are met "the employer *shall...* reinstate the employee in his former employment". (emphasis added). The effect of that section is to put the striker who returns to work under its protection in a better position than a striker who returns to his employer with only the protection of section 1(2). The Act is clear that the section 64 applicant is not merely to be reinstated as an employee (because by virtue of section 1(2) he has never lost his status as an employee) but that he must be reinstated *in his former employment*. In other words, "former employment" in this context means his job and unless the exceptions in section 64(2) operate, he is to be put back into his job or into work of a similar nature.

27. The mandatory language of section 64 assures the striking employee that, subject to the two exceptions, for six months he can be certain of having his job back, albeit on such terms as he can independently negotiate with his employer. The hiring of replacements is not an exception that entitles an employer to refuse reinstatement under section 64. On the contrary, section 64(2) provides that reinstatement can be denied only if *no one* is engaged

in the same work or work similar to the work that was previously done by the striking employee or, secondly, if there has been a discontinuance for cause of the employer's operations. The striker who returns to work under the protection of section 64 of the Act, therefore, has the unequivocal right to bump a replacement if that is what must be done to reinstate him in his job.

28. With the above principles as background, we turn to the merits of the instant case. The unchallenged representation of counsel for the union is that at the meetings of the employees on September 11, 1977 the union had in its contemplation the decision of this Board in *Artistic Woodwork Co. Ltd. (supra)*. In that case a collective agreement had been concluded on December 3, 1973. The Board held that a group of striking employees who made unconditional applications for reinstatement under section 64 of the Act on December 6, 1973 could not avail themselves of the protection of that section. That conclusion correctly reflects the undoubted principle that once a collective agreement is in place there can be no room for the kind of negotiation of terms and conditions of employment on an individual basis as contemplated in section 64. (cf. *McGavin Toastmaster Ltd. v. Ainscough* (1975) D.L.R. (3d) 1 (S.C.C.)).

29. The employers submit that at the union meetings of September 11, 1977, all formalities apart, the employees agreed to end their refusal to work or, as the employers would have it, ended their strike. Based on his interpretation of section 64 counsel for the employers therefore submits that as the strike had ended section 64 was no longer applicable and its protection was therefore not available to the grievors on the morning of September 12, 1977, when they filed their written applications for unconditional reinstatement. In our view that argument fails.

30. Firstly, a distinction must be drawn between an intention or an agreement among employees to end a strike and the actual ending of the strike by a return to work. In view of the definition of "strike" in section 1(1)(m) of the Act it cannot be said that employees who are out on strike and plan at some future time to return to work have ceased to strike any more than it can be said that employees who are at work and plan at some future time to walk out have commenced a strike. Whatever feelings or intentions may have been in the air at the employees' meetings on Sunday, September 11, 1977, for the purposes of the Act it cannot be said with any certainty that the lawful strike ended until the concerted refusal to work was replaced by an actual and general return to work or, failing that, until a collective agreement was signed and was in effect. Viewed in that light, there is nothing in the facts as agreed to establish that the strike had in fact ended when the grievors submitted their applications for reinstatement.

31. Secondly, it is not necessary for the operation of section 64 of the Act that a strike be continuing after applications for reinstatement are filed with the employer. It is only necessary that those who make the applications have been engaging in a lawful strike at the time they make their applications. If all of the striking employees had filed applications for reinstatement, and could be said by that very act to have ended their strike, they would be no less entitled to the protection of section 64 of the Act. Obviously the end of the strike and the filing of the applications would in that case be coincident in time. But there is nothing in the scheme of the Act to suggest that the shelter of section 64 must be limited only to employees who are deserters from their union's cause. And there is nothing in the balance of power in industrial relations or the legitimate economic interests of employers engaged in

collective bargaining to justify the ironic conclusion that a group of employees seeking reinstatement on an unconditional basis under section 64, a reinstatement whose very terms would afford a victory to the employer, must be denied that right merely because their request for reinstatement was unanimous. A consequence so inconsistent with the scheme of the Act was not intended by the Legislature in its enactment of section 64.

32. Is there anything contrary to the intention of the Act in the fact that the union relied on the words of section 64 and a reported decision of this Board to order its affairs so as to protect its members? We think not. Subject only to the requirement that it bargain in good faith, when a trade union is faced with a contract offer that has no conditions attached as to the time for acceptance, we see no reason why it should not have the same freedom that all parties to contracts must have. That is, the freedom to choose the time at which it will bind itself by formally accepting the offer through the execution of a collective agreement.

33. We find that when the applications were filed there was nothing to foreclose the access of the grievors of their rights under section 64 of the Act. The union was determined that there would be no acceptance of the offer by signing an agreement and no return to work unless and until the unconditional requests of all of the grievors had been filed with the employer. There is no reason to doubt that if that process had taken several days the employees would have remained out of the plant, off their trucks and in a no-contract situation for all of that time. The fact that it took only a few hours to complete the process does not change the principles to be applied to determine when the availability of section 64 ended. The grievors had a right to file written, unconditional applications for reinstatement when they did and the employer had a duty to reinstate them.

34. That brings us to the alternative submissions of counsel for the employers. Having found that the grievors in the instant case were entitled to invoke the protection of section 64 of the Act, is there anything in the conduct of the parties that should cause the Board to exercise its discretion to withhold a remedy from the grievors?

35. We deal firstly with the participation of a segment of the grievors in the unlawful strike against Ind-Ex. The decision of the Supreme Court of Canada in *McGavin Toastmaster (supra)* has settled any doubts that may have existed with respect to the status of employees who engage in a strike that is unlawful. They do not cease to be employees by virtue of that fact alone. Of course while section 1(2) establishes that striking alone does not terminate their employment status, it does nothing to shelter employees from whatever discipline or discharge may, for just cause, be imposed by the employer under the provisions of the collective agreement as a result of their participation in an unlawful walkout. As Chief Justice Laskin once commented as an arbitrator: "As an abstract proposition, if participation in an unlawful strike and picketing is not cause for discharge there can hardly be any dereliction of duty to an employer in respect of service that would be". (*Re U.S.W. and Aerocide Dispensers Ltd.* (1965), 16 L.A.C. 57 at 61; see also *Re Iron Ore Co. of Canada and United Steelworkers, Local 5795* (1975), 11 L.A.C. (2d) 16). Striking unlawfully is, of course, a serious breach of The Labour Relations Act. In the instant case, however, the employer did not of its own initiative take any disciplinary action against the employees for participating in an unlawful strike. And apparently it did not pursue the alternative recourse available to it, an application for a declaration and a cease and desist order in respect of the unlawful strike before this Board under section 82 of The Labour Relations Act. Ind-Ex could

not, of course, by the remedial scope of section 82, have gained the discharge of the grievors by any order of this Board. Now the employer asks us to do what it consciously failed to do. If anything, in these circumstances, our discretion should be exercised to deny a motion that would seek to achieve for the employer by a carom shot what it failed to directly and diligently pursue for itself months ago.

36. We likewise do not find that the bare fact of allegations and criminal charges against the grievors should disentitle them to their right to a remedy under section 79 of The Labour Relations Act. Allegations are not evidence, and for the purposes of this decision we have no evidence of wrongdoing by any of the grievors. There is nothing, of course, in section 1(2) of the Act to insulate an employee from discipline or discharge for unlawful misconduct harmful to an employer during the course of a lawful strike (see. e.g. *Re Oil, Chemical & Atomic Workers, Local 9-341 and Inmont Canada Ltd.* (1970), 21 L.A.C. 411). We make no comment on what the rights of the grievors would be in proceedings that might deal with the merits of that question. Before us the employers took the position that the employees had not been discharged or disciplined. The refusal to reinstate them is based solely on the fact that the employees in question were the subject of criminal charges, without regard to the ultimate merits of those charges. Before the courts those employees are presumed innocent until proven guilty. We have no evidence of wrongdoing by any of them during the lawful strike either by labour relations standards or by criminal law standards. They should therefore be entitled to nothing less than the same presumption before this Board.

37. For all the above reasons the Board finds that the employers Beckers and Ind-Ex have unlawfully refused to reinstate the grievors contrary to section 64 of The Labour Relations Act. We shall remain seized of the complaint in the event that the parties are unable to reach an agreement as to the terms of reinstatement and compensation of the grievors.

DECISION OF BOARD MEMBER J. D. BELL:

I agree with the decision of the majority of the Board in regard to the rights given to strikers by section 64 of The Labour Relations Act and the application of such rights to this particular case.

However, I do not wish to participate in the *obiter dictum* discussion of section 1(2) of the Act and its application. This section was not pleaded or argued by either the complainant or respondents and therefore is not before the Board for discussion in this case.

1070-77-R Mount Nemo Truckers Association, (Applicant), v. **Canada Crushed Stone, A Division of Steetley Industries Limited; A. Cupido Haulage, Peter Bawtinheimer Limited, K.F. Marshall Limited, Benny Haulage Ltd.**, (Respondents), v. Teamsters, Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, (Intervener).

Certification – Employee – Whether person who employs others can be a dependent contractor.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members D.B. Archer and J.D. Bell.

APPEARANCES: *J. McNamee and F. Passant for the applicant; E.L. Stringer, D. Foy and I. McGregor for respondent #1; M.G. Mitchnick and A. Cupido for respondent #2; Stephen Flott for respondent #3; B.R. Baldwin and Ralph Wells for respondent #4; David J. Jackson and Gary Stewart for respondent #5; C. Hillmer for the intervener.*

DECISION OF THE BOARD; December 8, 1977.

1. The name "Canada Crushed Stone Ltd." appearing in the style of cause of this application as the name of respondent #1 is amended to read: "Canada Crushed Stone, A Division of Steetley Industries Limited."

2. The name "Peter Bautinheimer Ltd." appearing in the style of cause of this application as the name of respondent #3 is amended to read: "Peter Bawtinheimer Limited."

3. The name "K.N. Marshall Ltd." appearing in the style of cause of this application as the name of respondent #4 is amended to read: "K.F. Marshall Limited."

4. This is an application for certification coupled with an application under Section 1(4) of the Act for a declaration that all the named respondents constitute a single employer for purposes of the Act.

5. It is the contention of Canada Crushed Stone that a number of employers contributed support to the applicant organization such that Section 12 of the Act constitutes a bar to the instant application. It was agreed by all parties to this application that the Board should deal with the Section 12 issue before proceeding further with the application.

6. The facts relevant to the Section 12 issue are set out below:

- (1) Those claiming to be dependent contractors in the employ of the respondents appointed a committee of three persons to act on their behalf in seeking certification under the Labour Relations Act. The three persons appointed were Mr. F. Passant, Mr. M. Cole and Mr. Ritchie all of whom claim to be dependent contractors in the employ of the respondents.

- (2) These three persons made contact with the Mount Nemo Truckers Association on behalf of their principals, retained counsel, signed those claiming to be dependent contractors into membership, collected the required \$1 from each person signed into membership, opened a bank account and generally processed the instant application which was filed in the name of the Mount Nemo Truckers Association.
- (3) Mr. F. Passant, one of the three appointed to the aforementioned committee, owns and operates Passant Trucking Limited.
- (4) Passant Trucking Limited owns and operates 10 trucks and other equipment, all of which are marked by the designation Passant Trucking Limited.
- (5) Passant Trucking Limited employs 7 persons to operate its equipment. These persons are paid by Passant Trucking Limited which makes the necessary Income Tax, Unemployment Insurance and Workmen's Compensation deductions.
- (6) Mr. F. Passant, as the owner of Passant Trucking Limited, hires his own employees, sets their terms and conditions of employment and assigns work.
- (7) Passant Trucking Limited has done business with at least 11 different customers, including Canada Crushed Stone, in the two years prior to this application and was doing business with 4 customers, included Canada Crushed Stone, at the time of this application. Passant Trucking does about \$250,000 business per year and had done approximately \$100,000 of business with Canada Crushed Stone up to September, 1977.
- (8) Canada Crushed Stone unilaterally sets the ton-mile rate it pays to Passant Trucking Limited for haulage of its product.
- (9) The parties are agreed that the evidence going to the employer status of Mr. Passant should also be applied to Messrs. Cole and Ritchie, the other two members of the organizing committee.
- (10) No attempt was made to sign the employees of Messrs. Passant, Cole and Ritchie into membership and no membership cards were submitted on their behalf.

7. Having regard to the evidence before it the Board is satisfied and hereby finds that Mr. F. Passant is an employer, both in form and substance, as are the other two members of the organizing committee, and further that they contributed support to the applicant union.

8. The bargaining unit sought by the applicant is:

All drivers employed by, or under contract to, the respondents working in or out of Dundas, Ontario, except those already covered by a pre-hearing collective agreement.

9. The membership eligibility provision set out in the Constitution of the Mount Nemo Truckers Association reads as follows:

“4(1) All truckers and other persons engaged in the trucking industry, whether dependent contractors or otherwise in the Province of Ontario, who are eligible to be represented by a collective bargaining agent or who are employees within the meaning of the Labour Relations Act shall be eligible for membership in this organization.”

10. It is the position of the respondents in this matter that Section 12 of the Act establishes a mandatory bar to the certification of a trade union “if any employer” has contributed financial or other support to it. Counsel for Canada Crushed Stone argued that the evidence clearly establishes Mr. Passant as an employer who has contributed support to the applicant thereby activating the bar. He argued that the failure of the Board to apply the bar would create the very potential for conflict of interest which Section 12 is designed to eliminate. He referred to the situation which would develop if this application were not barred and the employees of Passant were at some later date to be accepted into membership in the Mount Nemo Truckers Association. He also referred to the possibility of the employees of Passant and the others being swept into the applied for bargaining unit. Counsel for the union argued that Section 12 is not designed to cover the instant situation but rather the situation in which the employer of those in the proposed bargaining unit lends his support to the applicant. He cited the *Fownes Construction Co. Ltd.* case, (1974) 1 CLRB Rep.510 in support of the proposition that a person can be both an employer and an employee (dependent contractor) at the same time and argued that in this case Mr. Passant and the others were treated as employees by Canada Crushed Stone and therefore must be treated as employees for purposes of this application. He argued that any conflict of interest which materialized in the future could be dealt with by the application of Section 12 at that time.

11. Section 12 of the Act stipulates:

“The Board shall not certify a trade union if any employer or any employers’ organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry or place of origin.”

12. In one of the earliest cases involving Section 12 as it is now drafted, the Board emphasized that the Section must be applied having regard to its underlying purpose. The Board in the *Edwards and Edwards Ltd.* case, 52 CLLC ¶17,027 commented:

“The unfair practice sections of the Act, (including section [56] which prohibits the type of employer conduct referred to in section [12]), are, in large part, designed to safeguard the freedom of employees to join and to bargain collectively through the trade union of their own choice which is granted in section 3. That purpose is furthered by the provi-

sions of section [12] which places upon the Board the obligation to satisfy itself that no employer has meddled in the affairs of an applicant for certification. The section is clearly aimed at 'company-dominated' trade unions which are not entitled to be certified, on the theory that a trade union fostered by an employer cannot be considered as having been freely chosen by employees. The section designates conduct by means of which an employer might seek to confine the broad right conferred by section 3 and is therefore to be called into play where that purpose appears. We consider it is intended to be applied where employer activities are of such a character or are of such proportions that it is reasonable to infer that the employees have not exercised a free choice in the matter of the selection of a bargaining agent, or where an employer has given material assistance to a trade union in connection with its organizational or other activities; where, in other words, the particular applicant is not truly the chosen bargaining agent of the employees concerned. It is argued that because of its explicit language, section [12] need only be literally construed and mechanically applied. We suggest that it can properly be interpreted only by reference to what is its obvious intent: to prohibit the certification of any trade union which, because of the nature of its relationship with an employer, is not qualified to act on behalf of employees in their relation with their employer."

See also *Millwork and Building Supplies Company Limited* case [1968] OLRB Rep. June 273 and the cases cited therein.

13. In all of the reported cases the alleged support or participation has been by the employer party to the application. The Board, in dealing with that type of situation, has correctly found that Section 12 is designed to prohibit the "sweetheart" deal between the employer party and the trade union party to the certification application. Did the legislature intend that the application of Section 12 be restricted to the "sweetheart" deal? Is this the only type of employer support which destroys the qualification of a trade union to act on behalf of the employees it seeks to represent? This is the first case in which the Board has been asked to apply the Section 12 bar in respect of alleged support by an employer other than the employer party to the certification application. In view of the Section 12 prohibition extending to "any employer", as distinct from "the employer", it behoves the Board to consider the particular circumstances of this case vis-a-vis the overall scheme of the Act and in particular, the meaning of the "dependent contractor" provisions and decide if the purpose of Section 12 extends to cover the instant situation.

14. A dependent contractor is defined in the Act in the following terms.

"1(ga) 'dependent contractor' means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;"

Section 1(gb) provides

“ ‘employee’ includes a dependent contractor.”

15. In the circumstances of this case, Section 12 cannot be applied without having regard to the definition of dependent contractor as found in Section 1(ga) and to the provision of Section 1(gb) that an “employee” includes a dependent contractor. If Mr. Passant and the other two members of the organizing committee are dependent contractors within the meaning of Section 1(ga), notwithstanding the fact that they are also employers, their activities on behalf of the applicant could not activate the Section 12 bar. The legislature did not intend to bar the certification of a trade union seeking to be certified for a unit of dependent contractors because of support tendered to it by the very persons to whom it extended employee status in 1975. If, on the other hand, these persons are not “dependent contractors” within the meaning of the Act then, having regard to the overall scheme of the Act which is to create a clear division between employers and employees, the employer status of these persons becomes more meaningful in respect of the application of Section 12.

16. In *Nelson Crushed Stone* case, [1977] OLRB Rep. Feb. 104, the first case in which the Board was called upon to apply the dependent contractor sections of the Act, the Board in “measuring the extent of the economic dependency of the contractor” cited the following excerpt from the decision of the Canada Labour Relations Board in *Midland Express Ltd.*, 74 CLLC ¶16,104 at page 844:

“Surely the test of control to be applied now to the dependency is of an economic nature. Are the persons involved obliged to sell their services in a market in which they are economically dependent on a single or a restricted few purchasers? Is their freedom to contract with any degree of independence so thwarted that they are in fact in a status equivalent to that of individual employees? One can envisage situations in which a person who would be completely independent from any employer-employee relationship in the common law contractual sense and yet would be absolutely dependent in such an economic sense.”

17. An application of the indicia laid down in the *Nelson Crushed Stone* case is not necessarily determinative of whether a contractor is a “dependent contractor” within the meaning of The Labour Relations Act. In a highly industrialized oligopolistic economy there are countless contractors who are economically dependent but because of the “total character of their business”, cannot avail themselves of the Labour Relations Act as a means of improving their bargaining strength. One need only look to the automotive parts industry where numerous suppliers work under contracts which place them in a position of economic dependence within the indicia laid down in *Nelson Crushed Stone*. These contractors or suppliers, however, are employers in their own right often employing into the hundreds. No one would suggest that the Labour Relations Act be extended to allow such contractors to band together and bargain collectively under the Act. The Labour Relations Act, which is designed to create and maintain a division between employees on the one side, and employers on the other, cannot be read as extending to this type of dependent contractor. In addition to considering economic dependency, therefore the Board must also consider the “total character of the business” in deciding whether a contractor more closely resembles an employee or an independent contractor in his relationship with the employer.

The employment of others is a factor which helps to define the "total character of the business." Is it a factor, however, which in and of itself colours the character of the business so as to remove its owner from the ambit of section 1(ga) of the Act?

18. The British Columbia Labour Relations Board grappled with this problem in re *Teamsters Local Union 213 and Fownes Construction Co. Ltd.*, (1974) 1 CLRB Rep. 510 wherein at page 512 the Chairman of the Board commented as follows:

"The third issue is the most troublesome of all. What is to be done with owner-operators who own more than one truck and thus employ other drivers to operate them? A person who owns quite a few trucks, whose main concern is renting the trucks with a driver, and who does not regularly drive a truck himself would not come within the scope of the 'dependent contractor' provision because he does not 'perform work or services' in a manner analogous to an employee. Another person with several trucks may drive one of these trucks regularly, but because of the total character of his business, should not be considered to be 'dependent'. However, we do not believe that an individual who owns perhaps two trucks, and thus employs a driver to operate one of them, is necessarily removed from the category of 'dependent contractor'. There is nothing illogical about finding that an individual is, at one and the same time, both an employer and an employee and it can also be true that an individual is both an employer and a dependent contractor. That always turns on a judgment about the facts of the particular case. The more difficult question is whether an individual, having been found to be a dependent contractor, should appropriately be included in the same bargaining unit as his employee. On the surface, that would seem to produce the kind of conflict of interest which the Code tries to prevent by such provisions as the managerial exclusion from the definition of 'employee'. However, we are now inclined to the view that this is largely a hypothetical concern in the real world of the construction industry. The opposing problem, which we have already mentioned in the earlier decision, is the owner-operator with two or three trucks becoming a major bone of contention in negotiations between the Teamsters and CLRA if he must be excluded from the unit. Counsel for Fownes, after arguing that all employers should be excluded, said that 'if it is of any comfort it may be a safe assumption that owner drivers in this category would receive essentially the same treatment as those outside the category.' In view of the history of this problem (as reflected in a case such as *Therien v. Teamsters*, [1960] S.C.R. 265), we are not so confident in that assumption. For this reason, we are not prepared at this stage to lay down any rule excluding all owner-operators who are also employers from the scope of the bargaining unit. Should there be challenges to the inclusion of any particular individual in the voting constituency, or questions put to the Board under section 34, we shall deal with such cases in all of their concrete detail.

In conclusion, the Board wants to make clear to these and to other interested parties that it is establishing these guidelines on the adminis-

tration of s. 48 on a tentative basis only. The notion of collective bargaining for 'dependent contractors' is a very new experiment in British Columbia labour relations. Now is not the time to lay down any rigid rules. The Board will be monitoring closely the experience in this and other bargaining relationships and will be ready to alter its conclusions here, should they later appear to be impractical or unfair."

This is the analysis relied upon by counsel for the union in this matter.

19. Professor Weiler draws a distinction in *Fownes* between the person with several trucks who drives one and employs several persons to drive the others, and the person who owns two trucks and employs one other person to drive the second truck. He goes on to conclude that there is nothing illogical about finding that an individual is at one and the same time both an employer and an employee. In refusing to lay down a blanket rule excluding dependent contractor-employers from the bargaining unit he refers to the problems which would arise at the bargaining table if the owner-operator with two or three trucks were excluded. This Board agrees that in the abstract there is nothing illogical about finding that an individual can be both an employee and an employer at one and the same time. Many employees, especially those with special skills or with shift arrangements which permit, carry on business distinct and apart from their employment in which they may employ others. The concept of the dependent contractor-employer, however, is not one which can easily be made to fit within the confines of The Labour Relations Act where both the dependent contractor-employer and his employees supply their services to a common buyer (i.e. in this case Canada Crushed Stone) who is the employer party to an application for certification. Sections 1(1)(e), 1(1)(n), 1(3)(b), 12, 40 and 56, among others, serve to create and maintain a division between employees and employers. Indeed, the definition of "dependent contractor" stipulates that the relationship of the person claiming to be a dependent contractor with the employer must more closely resemble that of an employee than that of an independent contractor. Professor Weiler seeks to draw a distinction between the owner-operator who employs several persons and the owner-operator who employs only one or two other persons. The distinction is clearly one of degree. The qualitative distinction, or the difference in kind, is between the owner-operator who uses his own labour and employs no one and the owner-operator, who, in addition to his own labour, uses and attempts to profit from the labour of others.

20. In seeking to draw the line in such a way as to bring within the Act those dependent contractors who by the nature of their business more closely resemble employees and to exclude those who more closely resemble independent contractors the Board has been struck by the qualitative difference between the contractor who derives income from the labour of others and the contractor who does not. The Board takes the view that the line must be drawn so as to exclude from the operation of the Act those contractors who, although economically dependent, are themselves employers deriving income from the labour of others. It must be found that the nature of their business is such that within the meaning of the Act they more closely resemble independent contractors than employees in their relationship with the employer. The exclusion of these persons accords with the statutory definition and also maintains the clear division between employers and employees created by the overall scheme of The Labour Relations Act.

21. The practical considerations raised in the *Fownes* case with respect to the "major

bone of contention" which would develop at the bargaining table if the owner-operators with two or three trucks were excluded, is not a justification for including such persons within the scope of the Act. If the owner-operator who owns two or three trucks should be included because his exclusion would create a bone of contention at the bargaining table, what of the owner-operator with "several" trucks? His exclusion would create a bigger bone of contention and yet it is acknowledged in the *Fownes* decision that because of the "total character of his business" he should not be considered to be dependent. This Board is concerned with the uncertainty which would be generated, with resulting litigation, if it were to attempt to draw an artificial distinction between the contractor who employs two or three persons and the contractor who employs several persons. Having regard to the scheme of the Act, to the definition of "dependent contractor" and to the need for certainty in organizing, the line must be drawn so as to make the qualitative distinction referred to in the preceding paragraph.

22. If the Board was to extend the benefits of The Labour Relations Act to certain employers simply because of their economic dependency, the result would be to create the very potential for conflict of interest which the Act is designed to prevent. The constitution of the applicant in this matter extends membership eligibility to both dependent contractor-employers and to the employees of these persons conditional upon a finding by the Board that they are "employees" for purposes of the Act. If the applicant were to organize the employees of one of these dependent contractor-employers, the anomalous situation of an employer and his employees belonging to the same union would exist. (See *Dr. George A. Morgan U.A.W. Dental Centre*, [1977] OLRB Rep. Jan. 1.) The Act must be interpreted in such a way as to avoid the potential for conflict of interest which might thus develop if dependent contractor-employers were found to be "dependent contractors" within the meaning of the Act.

23. Having decided that the line should be drawn to exclude dependent contractor-employers from the meaning of "dependent contractor" as defined in Section 1(ga) of the Act, the Board must emphasize that its decision in this regard is intended to exclude only dependent contractors who are employers in substance as well as form. It is this type of dependent contractor who more closely resembles an independent contractor than an employee. A dependent contractor with the authority to hire, fire, discipline, and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protections of The Labour Relations Act. If, however, it is found that a dependent contractor does not possess this type of authority, then, notwithstanding the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under The Labour Relations Act.

24. The Board is satisfied on the evidence before it in this case that Mr. Passant and the other two members of the organizing committee are employers in form as well as substance. They have the authority to hire, fire, discipline and set the terms and conditions of employment. Without making a finding with respect to their economic dependency, the Board, having regard to the fact that they are employers, finds that they are not "dependent contractors" within the meaning of the Act.

25. The Board must now return to its consideration of the Section 12 bar having found that Messrs. Passant, Cole and Ritchie are not "dependent contractors" within the meaning of the Act. Is it necessary to proceed further? The effect of the Board's finding is to

deprive these employers of collective bargaining, and, under the terms of the applicant's constitution, cause these employers to be excluded from the applicant trade union. If these employers had not lent their active support to the union, beyond simply applying for membership, the Board's finding that they are not employees for purposes of the Act would dispose of the matter. (See *re Catholic Children's Aid Society*, [1976] OLRB Rep. Nov. 651.) In this case, however, the evidence clearly establishes these employers as the moving force behind the application for certification. The applicant union accepted and benefited from their support and accordingly, the Board must go further and decide if the Section 12 bar applies.

26. Having found that Messrs. Passant, Cole and Ritchie are not dependent contractors within the meaning of the Act, but rather that they are employers, it can no longer be argued that their interests and those of the "dependent contractors" coincide. The collective representation of the "dependent contractors" will result in a competition between the "dependent contractors" and these employers for the work emanating from Canada Crushed Stone. In the result the union which seeks to represent the "dependent contractors" has enjoyed the support of employers whose interests are potentially divergent from those whom it seeks to represent and whose interests may be affected by the collective representation of the trade union. Whereas the Board does not impugn the motives of these employers or the union in this case, a potential for conflict of interest now exists and in the circumstances the Section 12 bar applies.

27. Section 12 of the Act bars the certification of a trade union which has accepted the support of "any employer". The broad purpose of the section, simply stated, is to preserve the integrity of the collective bargaining process by barring the application of any trade union which, because of employer support, does not owe its sole allegiance to those whom it seeks to represent. A trade union which has accepted the support of any employer whose interests may be affected by its representation places itself in a potential conflict of interest and thereby undermines itself as a union "qualified" to act on behalf of those it seeks to represent. Section 12 catches both the "sweetheart" arrangement between the parties directly affected and also the accepted support of any outside employer whose interests may be affected by the collective representation of those whom the union seeks to represent. In both instances the union's acceptance of employer support activates the Section 12 bar.

28. The evidence in this case establishes that the applicant has enjoyed support within the meaning of Section 12 from an employer whose interests stand to be affected by the collective representation of those whom the union seeks to represent and accordingly the Section 12 bar must be applied.

29. This application is hereby dismissed.

0655-77-R The International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW), (Applicant), v. **Hughes Boat Works Incorporated**, (Respondent), v. Employee, (Objector).

Sale of a Business – Effect of appointment of a receiver and six month shutdown preceding reopening – Whether business has been sold, transferred or continued.

BEFORE: Rory F. Egan, Alternate Chairman and Board Members H. J. F. Ade and E. Boyer.

APPEARANCES: Al Seymour and Patrick Moran for the applicant; G. Grossman and Howard Hughes for the respondent; Malcolm Spence for the objector.

DECISION OF THE BOARD; December 15, 1977.

1. In its decision dated November 15, 1977, the Board found "that Hughes Boat Works Incorporated is bound by the terms of the Collective Agreement made between North Star Yachts Limited and UAW Local 1620 on May 28, 1975." The reasons underlying the decision are set out below.

2. This is an application brought under section 55 of The Labour Relations Act, in which the applicant alleges that a sale of a business has transpired between North Star Yachts Limited (hereinafter called "North Star") and Hughes Boat Works Incorporated (hereinafter called "Hughes Incorporated").

3. In section 55, a sale is defined thus:

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings.

4. At the time of the alleged sale, there was in existence a collective agreement, effective May 28, 1975, between U.A.W. Local 1620 and North Star, covering a period of three years.

5. It is the claim of the applicant that the agreement is binding upon Hughes Incorporated by virtue of the provisions of section 55(2) of the Act which states:

Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto ...

6. The respondent takes the position that no sale of a business within the meaning of the Act has transpired and that the application should, accordingly, be dismissed.

7. The respondent argues that the business carried on by North Star ceased altogether on December 25, 1976 and that no production took place in the plant until six months later. The respondent maintained that there was no continuum, that the business

formerly carried on by North Star was not a going concern, but that the matter was in the hands of a Receiver at the time that Hughes Incorporated became involved. The respondent further relied upon the assertion that goodwill was not part of the transaction. The transaction, the respondent argues, involved nothing more than the sale of assets.

8. The respondent relied upon the decisions of the Board in *Dufferin Steel Company, Awico Division*, [1976] OLRB Rep. Mar. 81, *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, and *Brantford Concrete Pine Company Limited*, [1966] OLRB Rep. Dec. 731.

9. In order to obtain a full understanding of the matter, it is necessary to refer to yet an earlier operation which was known as Hughes Boat Works Limited. This was a family corporation which commenced the building of boats in a small way but which expanded until between 1967 and 1969 it employed approximately 90 persons. In 1967 the company moved the business from Toronto to Huron Park, the site of the operations with which we are here concerned. The company took with it 25 families of employees.

10. In 1969 United States Steel purchased an eighty per cent interest in Hughes Boat Works Limited. The Hughes Brothers, Peter and Alec, continued with the firm as President and Vice-President. From 1969 to 1971 the boat-building business was carried on with annual sales of about 3 million dollars.

11. In 1971 the Hughes family sold the remaining twenty per cent of its shares to United States Steel and entered into an agreement not to engage in the boat-building business for a period of 5 years. The Hugheses went into the manufacture and rental of motor homes.

12. In 1974 United States Steel sold the business to North Star. North Star ceased production on December 25, 1976 and laid off employees on January 6, 1977.

13. In January 1977 the Clarkson Company Limited was appointed Receiver and Manager, pursuant to the terms of a floating charge debenture issued by North Star to Ontario Development Corporation (hereinafter called "ODC"). The Clarkson company was also appointed agent of the Canadian Imperial Bank of Commerce under security documents executed by North Star under section 88 of the Bank Act.

14. The Clarkson company employed some former employees of North Star for a short period to help with reviewing accounting and inventory. Some management help was also used to deal with the assembly of yachts in process.

15. The Clarkson company advertised for tenders on the lease and assets covered by the ODC's and the bank's security. Tenders were to be received by March 24, 1977.

16. The bank's security covered the inventory of raw materials and work in process. The Receiver sold off most of the work in process. Approximately \$40,000 was received for work in process. On three occasions, Clarkson sold inventory for a purchase price of over \$1,000. The value ascribed to the inventory of raw material by Clarkson in its advertisement for tenders was \$130,000. In the tender, Clarkson received bids of \$12,000 to \$13,000 on the inventory of raw materials package. On April 22nd Hughes made an offer to purchase.

17. On May 19, 1977, Hughes and Clarkson, as agent for Canadian Imperial Bank of Commerce, entered into an agreement of purchase and sale. For the price of \$40,000, Hughes purchased the inventory of raw materials and finished goods, as well as any work in process which had not been sold.

18. ODC held the lease with North Star Yachts and its security covered North Star's fixed assets. Clarkson received four *en bloc* bids covering ODC's assets, excluding the lease and the bank's assets. These bids ranged from \$75,000 to \$130,000, and \$133,000 was tendered by an auction firm. Clarkson did not make any *en bloc* sales at this time, since it considered that the bids had not been high enough.

19. In May 1977, Hughes agreed to buy certain North Star assets. The purchase price was \$100,000. ODC agreed to lend Hughes the entire \$100,000 upon execution of a debenture. ODC also agreed to lease the premises to Hughes.

20. The agreement of purchase and sale between Clarkson and Hughes Incorporated (then 358084 Ontario Limited) conveyed "assets which [subject to certain exceptions] comprise all of the undertaking, property and assets used by North Star in the carrying on of the business ...". Consideration for the agreement included the agreement by ODC to lend monies and lease property. In addition to office furniture and equipment, machinery and equipment and automotive equipment, the purchased assets included "all molds, jigs, patterns and design specifications of North Star and all North Star's rights with respect thereto ...; all trade marks, trade names, copyrights, patents, licenses and generally all industrial property of, pertaining to or connected with the business;" and "the goodwill of the business together with the exclusive right to the purchaser to represent itself as carrying on the same in continuation of and in succession to North Star, the right to use any words indicating that the business is so carried on and the right to use the name 'North Star' or any variation thereof, as part of the name of or in connection with the business as it may be carried on by the purchaser; ...". Also, the purchaser acquired "any existing contracts, orders and engagements to which North Star may have been entitled in respect of the business". The accounts receivable were not conveyed either by this agreement or by the agreement of purchase and sale between the bank and Hughes Incorporated. The parties agreed that the purchase price was allocated as follows:

(1)	To goodwill and trade name	\$ 1.00
(2)	To all assets not directly used in the production process	\$21,682.00
(3)	To all other assets	\$78,317.00

21. The agreement was conditional on a lease being duly executed between Hughes Incorporated and ODC, and the purchase of all work in process and inventories of North Star being completed by agreement between Hughes Incorporated and the bank. The conditions were met and the closing date was May 19, 1977.

22. Thus, on May 19, 1977, when both agreements of purchase and sale closed, Hughes Incorporated (at that time known as 358084 Ontario Limited) had acquired the fixed assets, goodwill, trademarks, molds, patents, most of the inventory of raw materials, finished goods and any work in process that had not been previously sold by Clarkson. In addition, Hughes Incorporated had a lease and a debenture with ODC.

23. Mr. Hughes testified that they had an unconditional offer on the inventory, since they wanted to get back in the boat business and planned to move the inventory to Orangeville if no deal could be made with ODC. He said that ODC wanted to minimize unemployment in the area and asked the Hugheses to "put a proposal together to open up again in Huron Park". The loan, free rent for 14 months, and the non-payment of interest for a prescribed time provided for in the agreement with ODC, were in order to induce the Hugheses to move back and carry on the business in Huron Park.

24. On June 1, 1977, production started at Huron Park. About eighty per cent of the employees hired by the new Hughes Incorporated were formerly North Star employees and some had been employees of the old Hughes Boat Works Limited. Although Mr. Hughes was unable to say whether or not the employees were doing the same kind of work as they did for North Star, he expressed the opinion that it was probably the same as they would have performed at the old Hughes Boat Works Limited.

25. Hughes Incorporated has not used the name "North Star". Hughes' stationery and advertising use the name "Hughes".

26. Many of the boats presently being produced appear to be similar to those produced by North Star. Mr. Hughes gave the example of the 26 ft. boat being produced. The Hughes' 26 used to be the North Star 26. However, Hughes has made 30 major and minor changes in design, construction and appearance of the boat and the price of the boat has increased from \$12,500 to \$14,700. Some North Star boats may not be produced and others may be produced only after major design changes. They will be given the "Hughes" name rather than "North Star". Hughes boats that were not produced by North Star may again be produced. The manufacturing process is basically the same.

27. In determining whether there has been a sale or other disposition of a business within the meaning of section 55, the Board takes into account the totality of the transaction and places little reliance upon its outward legal form. In addition, the Board, in dealing with the scope of the wording found in section 55, has expressed itself in *Thorco Manufacturing Limited*, 65 CLLC ¶16,052 in the following language, with which we concur:

"...it is our opinion that the generality of the words *and any other manner of disposition* is not intended to be in any way limited by or interpreted *ejusdem generis* with the words leases, or transfers. In our opinion, it is more in harmony with the language of and the remedy envisaged by the enactment to interpret the words *and any other manner of disposition* as an omnibus or saving provision intended to include dispositions of the business or a part or parts thereof by any mode or means whatever which are not appropriately described by the preceding words which state that 'sells' includes 'leases or transfers'."

28. There can be no doubt that the definition is broad enough to cover the situation where transactions are carried out through a Receiver or agent appointed under a defaulted debenture or other type of security such as those present in the instant case. (See *Marvel Jewellery Limited and Danbury Sales Ltd.*, [1975] OLRB Rep. Sept. 733; *Culverhouse Foods Limited*, [1976] OLRB Rep. Nov. 691.)

29. The respondent, as already noted, also took the position that in this case there was no continuum and that the business was not sold as a going concern since it had been closed down for approximately 5 months. It is to be observed, however, that in the *Culverhouse Foods Limited* case (*supra*), the Board stated:

“In each case the *decisive* question is whether or not there is a continuation of the business. The most appropriate test to be applied in making this determination is whether the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction.”

(emphasis added)

30. In other words, what is referred to as a continuation of the business has reference not to a continuum in time, but in the nature of the business. In the instant case, although there has been some change in design and there is potential for new boat designs, the nature of the business continues to be that of the construction and sale of boats, carried on through the same manufacturing processes as before. Thus, there has clearly taken place a transfer of the functions carried on prior to the sale. (*Marvel Jewellery Limited and Danbury Sales Ltd.* (*supra*)).)

31. The correct test as to the existence of continuum, we suggest with respect, is that set out in the *Marvel* case above. It is true that in the *Brantford Concrete Pipe Company Limited* case (*supra*), where the Board found that a sale of the business had not taken place, the Board referred to the fact that the employer-purchaser had not taken over the business of the vendor company as “a going concern”, the plant having been shut down and under receivership for a period of six months. The reference was made, however, not to support the proposition that the six-month shutdown broke the continuum insofar as the nature of the business was concerned, but for the purpose of differentiating the facts from those in the *D.H.I. Limited* case, [1964] OLRB Rep. Aug. 237, where a Receiver also had been appointed but where the business in question had indeed been taken over as a going concern. The Board in the *Brantford Concrete Pipe Company Limited* case, having made that distinction, goes on to say that the employer with which it was concerned had, on the other hand, not purchased a “going concern” but, rather, had only acquired the physical plant – that is, the land, buildings, equipment and installations. In other words, the *Brantford Pipe* case simply indicates that the business was not a “going concern” because of the six-month shutdown. We do not believe the case stands for the proposition that the continuum, in the sense of the nature of the operation, is necessarily broken by such a lapse of time.

32. Incidentally, it is also clear that other matters, including the lack of goodwill, were considered in the *Brantford* case before a determination was made on the question of whether a sale had occurred. In that regard, note should be taken of the recitals contained in the agreements made in the present case in contrast to the offer made in the *Brantford Pipe* case (*supra*). The latter is set out in that award as follows:

“For the land and buildings the sum of \$65,000 to be paid in cash on the closing date.

For all of the equipment and installations, the sum of \$185,000 to be paid in debentures and/or ...”

33. Of relevance to the question of continuum is the comment of the Board (with which we respectfully agree and adopt herein) in the *Canada Cement Lafarge Ltd. and Point Anne Quarry Company*, [1975] OLRB Rep. Dec. 905 where, in dealing with a situation in which a sale of a quarry had been alleged, the Board said:

“... In one recent supermarket case – *Zehrs Markets Limited*, OLRB M.R. May 1974, p. 331, considerable emphasis was placed by the Board on the fact that there was ‘no continuum of the enterprise’ between the alleged Predecessor, Busy B Discount Foods Limited, and the successor, Zehrs Markets Limited. The Board noted that there was a six-or-seven month hiatus between the shutdown of the store by Busy B and its rental by Zehrs. The Board reasoned that, in the retail food industry, where it is recognized that the goodwill of the business inheres in the actual premises, the lapse of time is particularly significant. Whatever may be the situation in the retail food industry, we do not believe, in the instant case, that any significance attaches to the fact that the property lay dormant for over one year. *To hold that in every case there must be a continuation of the sort alluded by the Board in the Zehrs case would be to invite deliberate discontinuation for the purpose of evading the impact of section 55 of the Act.*”

(emphasis added)

34. That “continuum” has reference to the nature of the business is further borne out in the Board’s decision in *Dufferin Steel Company, Awico Division* (supra). In that case, the Board refused to find a continuum where the predecessor had produced primarily ornamental iron and miscellaneous steel products and the successor was primarily engaged in the production of plate. There was obviously no transfer of the functions carried on prior to the transaction into the new operations as there is in the instant case. Similarly, in the *Woodway Structural* case (supra), where it was argued in the alternative that a change in the character of the business had occurred, the Board, in finding that there was not a sale, took into account, among other things, the fact that the emphasis in the new company was on recreational equipment rather than on engineering structural components as had been the case with the vendor company.

35. The respondent, as already indicated, also took the position that there was no sale of the business because, in the words of Mr. Hughes, North Star had “burned” everyone with whom it had come into contact and, consequently, no goodwill in fact existed at the time of the transaction.

36. The agreement of May 19th, however, makes specific provision for the transfer of “the goodwill of the business together with the exclusive right to the purchaser to represent itself as carrying on the same in continuation of and in succession to North Star, the right to use any words indicating that the business is so carried on and the right to use the name ‘North Star’ ...”. It has already been noted that eighty per cent of the employees of North Star were hired by Hughes Incorporated.

37. There was also evidence that, notwithstanding the fact that the consideration allotted to goodwill by the agreement was only \$1.00, there had, in fact, been a bid containing an offer of \$300.00 for the goodwill of the business.

38. In addition, there were transferred any existing contracts, orders and engagements to which North Star may have been entitled. These are acquisitions related to the factor of goodwill.

39. In any event, while the presence of goodwill in a transaction is a persuasive factor going toward the finding that a sale has occurred, its absence is not conclusive of the contrary, particularly in a case where it has been established that the decisive factor, with respect to a disposition under section 55 referred to in the *Culverhouse* case (supra), is present.

40. In the result then, having in mind the terms and conditions set out in the agreements of May 19, 1977, and being persuaded that the evidence establishes the decisive and overriding fact that the nature of the work performed subsequent to the transaction is the same as the nature of the work performed prior to the transaction, the Board finds that a sale within the meaning of section 55 of the Act took place between North Star and the respondent on or about May 19, 1977.

0969-77-U International Brotherhood of Electrical Workers, Local Union 636, (Complainant), v. The Hydro Electric Commission of the City of Mississauga, (Respondent).

S-79 – Whether statutory freeze prevents employer from withdrawing privilege of using company vehicles.

BEFORE: G. Gail Brent, Vice-Chairman and Board Members D.B. Archer and F.W. Murray.

APPEARANCES: S.B.D. Wahl and D. Butler for the complainant; John P. Sanderson, Q.C., Joe Carriere and Lloyd Nicholls for the respondent.

DECISION OF VICE-CHAIRMAN G. GAIL BRENT AND BOARD MEMBER D.B. ARCHER; December 15, 1977.

1. The complainant has complained that the grievors have been dealt with by the respondent contrary to the provisions of sections 3, 56, 59 and 70(1) of the *Labour Relations Act* and requests:

(a) An Order that the respondent forthwith cease and desist from doing the acts complained of;

(b) An Order that the respondent forthwith cease and desist from violating the Act;

(c) An Order that the respondent, its agents, officers, officials, servants and representatives and all other persons acting for and on their behalf, and persons having knowledge of the Order, refrain from:

- (i) Interfering with the representation of the respondent's employees by the complainant;
 - (ii) Bargaining with or entering into a collective agreement with any person or another trade union or council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them so long as the complainant continues to be entitled to represent the employees;
 - (iii) Altering the terms and conditions of employment of the employees of the respondent contrary to section 70(1) of the Act;
 - (iv) Altering the rights, privileges or duties of the respondent contrary to Section 70(1) of the Act.
- (d) An Order that the respondent rectify all acts complained of herein;
- (e) Such further and other relief as the complainant may request and the Board may deem appropriate in the circumstances.

2. The parties have agreed upon the facts which are relevant to the determination of this matter. On August 8, 1975 the parties entered into a collective agreement which covered the period April 1, 1975 to March 31, 1977. On February 21, 1977 the complainant sent notice of its intention to re-negotiate the agreement to the respondent. In July, 1977 the complainant applied for the appointment of a Conciliation Officer and an Officer was appointed on July 20, 1977. On August 3, 1977 the respondent posted the following notice on its premises:

"USE OF COMMISSION VEHICLES

The following rules will apply effective August 15, 1977.

- (1) On call personnel will be responsible for their own home to office transportation.
- (2) Personnel working unscheduled or scheduled overtime, will be responsible for their own home to office transportation.
- (3) Vehicles taken from the garage for overtime work are to be booked out on form H.M. 644.
- (4) Commission vehicles are not to be used for private business."

This policy went into effect on August 15, 1977. On September 16, 1977 the parties were sent notice that a No Board Report had been filed.

3. Prior to August 15, 1977, when the above notice went into effect, the respondent had followed a policy of allowing employees who were on call during weekends to have commission vehicles to be able to come to work if called out, and of allowing employees who had to work unscheduled overtime and had no other means of transportation to use

commission vehicles, if available, to get from the shop to their home and back again. It was admitted that the notice of August 3, 1977 represented a change in policy on the part of the respondent, and that the complainant had not agreed to it.

4. On October 5, 1977 representatives of the parties signed a memorandum of settlement which had not yet been ratified as of the date of the hearing. The memorandum of settlement does not deal specifically with the matter before this Board.

5. The respondent decided to review its policy about the use of Commission vehicles for the following reasons. Sometime prior to June 30, 1977 one of the respondent's employees who had the use of a Commission vehicle at the time was apparently using that vehicle for his own purposes and wrecked the vehicle. The respondent had also noticed that the greater incidence of car pools led to more employees being stranded without transportation when called upon to work unscheduled overtime. This meant that the demand for Commission vehicles was increasing. It can be appreciated that the respondent would be concerned about its liability as owner of these vehicles, and the rising costs of running the vehicles.

6. If there is any violation of the Act by the respondent, it would have to be a violation of section 70(1). The facts which were agreed upon by the parties did not disclose, nor was it seriously argued, that there had been a violation of any other section of the Act which was set out in the original complaint. In order to determine whether there has been a violation of section 70(1) we must consider whether the change in policy represented an alteration of "the rates of wages or any other term or condition of employment or any right, privilege or duty, of the ... trade union or the employees" during the freeze period of section 70(1)(a)(ii).

7. Several cases were cited by the Board dealing with the interpretation of that section and specifically the question of whether the use of the phrase "the legal incidents of the collective bargaining relationship" in paragraph 11 of *International Chemical Workers, Local 159 v. Kodak Canada*, [1977] OLRB Rep. Feb. 49 somehow restricts the interpretation of that section to a freeze of those things which are a part of the collective agreement, or the bargaining relationship or an enforceable legal incident of that relationship. It may be that the use of the phrase "legal incidents of the collective bargaining relationship" suggests a narrower interpretation of section 70(1) than has been given in the past, but on reading the decision, and particularly paragraph 11, in full it is clear that the Board then recognized that the section prevents the unilateral alteration of privileges as well.

8. "Privilege" was used specifically in the section in question as were the terms "right" and "duty". "Privilege" has been viewed in legal analysis as being the absence of right, that is something which may be enjoyed but for which one has no enforceable claim against another. The jurisprudence of this Board has tended to interpret this section as preserving the status quo in toto and not allowing the employer to unilaterally withdraw benefits or incidents flowing from the employment relationship even though they may properly be withdrawn outside of the freeze period or during the course of the collective agreement, see *Canadian Union of Operating Engineers v. The Wellesley Hospital*, [1976] OLRB Rep. July 364.

9. In the case at hand the use of the Commission vehicles prior to August 15, 1977 was a benefit or privilege flowing from the employment relationship which may or may not

have been enforceable against the employer, and it was unilaterally withdrawn during the freeze period as set out in the Act. The section in question is, and always has been interpreted as, a "strict liability" section, therefore there is no need to find any anti-union animus on the part of the respondent. In the case at hand though it bears mentioning that there is absolutely no suggestion or trace of any such anti-union animus on the part of the respondent.

10. While the Board must not consider the lack of such animus in deciding whether there has been a breach of section 70, it may be that that can and ought to be considered when deciding on the sort of remedy to be fashioned. In the case at hand the employees were unilaterally deprived of the Commission vehicles on August 15th and this date was within the freeze period of the Act. The No Board report was issued on September 16, 1977 and October 1, 1977 would allow for fourteen days to have elapsed from that date. The employees were therefore wrongfully deprived of a benefit during that period and are entitled to have compensation for their losses. Therefore the Board orders that the respondent compensate those employees deprived of the use of available Commission vehicles during the period August 15th to October 1st. By agreement, the Board will remain seized of the matter if the parties cannot agree on the matter of compensation.

DECISION OF BOARD MEMBER W.F. MURRAY:

I dissent. My reasons therefor will be given at a later date.

1114-77-R Retail Clerks Union Local 486, (Applicant), v. Intercity Foods Services Inc., (Respondent), v. Group of Employees, (Objectors).

Certification – Bargaining Unit – Effect of employer having only one business location in municipal area – Whether appropriate unit should be restricted to that location.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members Wm. F. Rutherford and F. D. Kean.

APPEARANCES: *Les Dowling and Denise Martin for the applicant; Brian O'Byrne for the respondent; no one for the objectors.*

DECISION OF THE BOARD; December 20, 1977.

1. The Board hereby revokes its decision dated November 29, 1977 in its entirety, and the following is substituted therefor.
 2. This is an application for certification.
 3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The applicant applied for an all employee unit. The respondent, however, requested the exclusion of the employees employed for not more than twenty-four hours per week and students employed during the school vacation period. The Board's usual practice in these circumstances is to grant the requested exclusions if persons are actually employed in the named categories or if there is a history of so doing. An exceptional circumstance that would cause the Board to depart from this practice, however, is where just one employee who has indicated a desire to be represented by the union would be left in the proposed full-time unit (see *P. F. Collier & Son Limited*, [1966] OLRB Rep. Sept. 408 and *The Essex County Humane Society*, [1969] OLRB Rep. June 391). If, in such a case, the Board were to grant the employer's requested exclusions, the remaining employee would be deprived of the right to engage in collective bargaining after having indicated his desire to do so.

5. In the circumstances of this case, the single employee who would remain in the full-time unit if the Board grants the employer's request for the exclusion of students and part-time employees has not indicated a desire to be represented by the union. Accordingly, the Board will accede to the employer's request.

6. The respondent raised a further question with respect to the bargaining unit. The applicant applied for a geographic description of the municipality of Cornwall. The respondent has asked the Board to restrict this unit to the actual location of the Pik-Nik Restaurant in Cornwall. The parties agree that at the time of the application there was only one such restaurant in Cornwall.

7. When there is only one location in the municipality at the date of application, the standard practice of the Board, as set out in *The Great Atlantic & Pacific Tea Company Limited*, [1969] OLRB Rep. Jan. 1017, is to certify the applicant for the municipality rather than the particular location. Although the Board in *MacDonald's Restaurants of Canada Limited*, [1974] OLRB Rep. Oct. 755 and *Ponderosa Steak House (A Division of Foodex Systems Limited)*, [1974] OLRB Rep. Nov. 7, certified the applicants for specific locations rather than the municipalities, the circumstances of the instant case are readily distinguishable from these cases. In both cases referred to the respondents had more than one location in the respective municipalities. On the basis of the Examiner's reports concerning the operation of the various branches, the Board was able to conclude that the single locations applied for were appropriate for collective bargaining. Because in this case the respondent has only one location, any conclusions concerning the existence or non-existence of a separate community of interests between the existing Pik-Nik Restaurant and any future restaurants would be based solely on speculation.

8. Having regard to the circumstances of this case, therefore, the Board is not persuaded that it should depart from its usual practice and thus finds that all employees of the respondent at Cornwall employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except assistant managers and those above the rank of assistant managers, constitute a unit of employees of the respondent appropriate for collective bargaining.

9. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 28, 1977, the terminal date fixed for this application and the date which the Board determines, under section

92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

10. Statements of desire were filed with the Board but because no one appeared on behalf of the objectors the Board did not inquire into the voluntary nature of the statements of desire.

11. A certificate will issue to the applicant.

1120-77-R Raymond Albert Lambert, (Applicant), v. Ottawa Newspaper Guild, Local 205, (Respondent), v. The Journal Publishing Company of Ottawa, Limited, (Intervener).

Termination – Timeliness – Whether appointment of mediator pursuant to Board bargaining order bars application.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *J. Ronald Scott for the applicant; C.M. Mitchell and K. Fitzrandolph for the respondent; J.A. Beresford and L.A. Lalonde for the intervener.*

DECISION OF KEVIN M. BURKETT, VICE-CHAIRMAN AND BOARD MEMBER J.D. BELL; December 2, 1977.

1. The name "The Ottawa Newspaper Guild, Local 205" appearing in the style of cause of this application as the name of the respondent is amended to read: "Ottawa Newspaper Guild, Local 205."

2. This is an application brought under Section 49(2) of the Act for a declaration that the respondent no longer represents the employees in the bargaining unit for which it is the bargaining agent. The respondent union and the intervener employer have been engaged in a bitter economic conflict which continues as of the making of this application and which has been the subject matter of a bad-faith bargaining determination and subsequent requests for reconsideration. A request for reconsideration of the Board's bargaining order was pending as of the hearing in this matter.

3. Counsel for the respondent union raised a number of preliminary matters. He argued, firstly, that the Board not proceed until the panel seized with the bad-faith bargaining matter had dealt with the union's request for an amended bargaining order. He argued that the bargaining order might affect the timeliness of the instant application. The panel seized with the bad-faith bargaining complaint refused to alter its general bargaining order in a decision dated November 29, 1977 and dealt specifically with the union's request to postpone this application at paras. 15 and 16 of its decision. That panel in refusing to "stay" these proceedings commented that the time periods set out in Section 53(3) create a certain balance of bargaining power between the parties which the Board will not upset.

4. Counsel for the respondent union argued alternatively that the instant application is untimely by virtue of the operation of Section 53(2) of the Act. Section 53(2) of the Act, which determines the timeliness of an application under Section 49 of the Act, provides:

“Where notice has been given under section 45 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless, following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.”

It is the position of the respondent that pursuant to para. 64 of the decision of the panel dealing with the bad-faith bargaining complaint, dated June 20, 1977, the parties applied for the appointment of a mediator and a mediator was appointed, thereby activating Section 52(2) and barring the instant application for a period of one year from the date of the appointment.

5. Section 16 of the Act empowers the Minister to appoint a conciliation officer. Section 16(1) and (2) provide:

“16. (1) Where the Minister is required or authorized to appoint a conciliation officer, the Minister may, on the request in writing of the parties, appoint a mediator selected by them jointly before he has appointed a conciliation board or has informed the parties that he does not consider it advisable to appoint a conciliation board.

(2) Where the Minister has appointed a mediator after a conciliation officer has been appointed, the appointment of the conciliation officer is thereby terminated.”

This is the only section of the Act under which the Minister is empowered to appoint a mediator. The statute limits the authority of the Minister to appoint a mediator to the period before the appointment of a board of conciliation or notice to the parties that he does not consider it advisable to appoint a board of conciliation. In this case the Minister issued a "no-board" report on September 16, 1976 and under the provisions of Section 16 of the Act was no longer empowered as of that date to appoint a "mediator", as referred to in the Act. What then is the meaning of the Board's order of June 20, 1977?

6. The Provincial Ministry of Labour provides a voluntary mediation service to assist the parties to collective bargaining. The Board takes judicial note of the existence and effectiveness of this service. It is a service, however, which is not referred to in the Act. In the result the appointment of a mediator by the Director of Conciliation and Mediation Services in response to a request by the parties for voluntary mediation assistance cannot affect the timeliness of applications for certification or for termination of bargaining rights as established in the Act. The panel which dealt with the bad-faith bargaining complaints acknowledged at para. 17 of its June 20, 1977 decision that a "no board" report was issued on September 16, 1976. Having regard to this acknowledgement and to the restriction placed upon the authority of the Minister to appoint a mediator in Section 16, the order of the panel must be read as an order directing the parties to avail themselves of the voluntary mediation service referred to above. The appointment of a mediator pursuant to such an order cannot affect the timeliness of a subsequent application for termination of bargaining rights.

7. This application is therefore timely.

8. Counsel for the union argued thirdly, that the application is void because it has not been brought by an employee in the bargaining unit as required by Section 49(2) of the Act. It is the position of Counsel for the union that the persons who brought the application have lost their "employee" status by virtue of their failure to comply with the provision of Article 2 of the expired collective agreement which stipulates that membership in good standing in the guild is a condition of employment. Alternatively, counsel argues that the persons hired during the lock-out are not employees empowered to make an application under Section 49(2) of the Act. He referred the Board to the noun "persons" in Section 64(2) in support of this proposition.

9. The bargaining unit is defined in the scope clause of a collective agreement. In the instant collective agreement the bargaining unit description is set out in Article 1(a) and there is no dispute that the applicant is employed within that description. The Board need go no further in the absence of the union having enforced its rights under Article 2. in respect of the employee who brought this application. The Board is satisfied that the applicant is an employee within the relevant bargaining unit.

10. Does the applicant lose his entitlement to apply under Section 49 of the Act by reason of having been hired during the period of lock-out? The answer is an unequivocal no. As the Board stated in its November 29 reconsideration of its bargaining order:

"One of the risks of economic conflict for trade unions is that support within the bargaining unit may erode with the passage of time, either as a result of members finding employment elsewhere or by the hiring of non-union replacements. . ."

Section 64 of the Act, a section relied on by the union, deals with an employee's right to his job during a strike. It has no application either explicitly or implicitly to a lock-out situation. The use of the noun "persons" rather than "employees" in Section 64(2) precludes an employer from rejecting a striking employee's application for return to work on the basis that managerial persons (who are not employees for purposes of the Act) are doing the work. The employer would be able to refuse such an application if "employees" were used in Section 64(2) in place of "persons". The applicant is an employee within the bargaining unit described in the collective agreement.

11. The Board is prepared to hear evidence as to the origination, preparation and circulation of the statement in support of the application and accordingly, this matter is hereby referred to the Registrar.

DECISION OF BOARD MEMBER O. HODGES:

I dissent from that portion of the award wherein the majority acknowledge the right of a person hired during a strike or lock-out to initiate an application for termination of bargaining rights. My written reasons are to follow.

0580-77-U Teamsters Local Union No. 419, (Complainant), v. S. S. Kresge Company Limited, (Respondent).

Discharge for Union Activity – S-79 – Practice – Whether conflict between reverse onus provisions and Rule 46 – Whether Board will defer to nonstatutory company grievance procedure – Whether layoff motivated by anti union animus.

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members L. Hemsworth and H. Simon.

APPEARANCES: Doug Wray, Cameron Hillmer, Robert McGaw and Brian Harrison for the complainant; R. A. W. MacDermid and M. E. Clarke for the respondent.

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER L. HEMSWORTH; December 22, 1977.

1. This is a complaint under section 79 of The Labour Relations Act alleging that 37 employees of the respondent have been treated contrary to sections 58, 61 and 63 of the Act, and seeking reinstatement in employment and compensation for the grievors.

2. When this complaint came on for hearing, the respondent raised preliminary objections to the Board proceeding on the grounds that:

- (a) the complainant has not, on the face of the pleadings, made out a *prima facie* case as is contemplated under Board Rule No. 46. The respondent argues that the shifting of the burden of proof under

section 79(4)(a) of the Act is clear and accepted, but that does not relieve the complainant of the Rule No. 46 obligation. The respondent further points to the Board's decision in *Teamsters Local 419 v. ICB Warehousing*, [1976] OLRB Rep. Oct. 621, as recognizing that both Rules 46 and 29 are operative in a section 79 complaint to preclude vexatious claims and employer harassment and would argue that in this case the timing of Board actions would preclude any screening of the complaint such as is contemplated by these Rules;

- (b) there exists an alternative remedy here in respect to employees who claim to have been improperly laid off in that, while there is no collective agreement in operation, a written and publicized Company grievance procedure which provides, as its terminal step, for determination by an outside umpire with all costs borne by the Company and with the Company having publicly agreed to such umpire's determination, is an adequate alternative remedy such that the Board should defer its jurisdiction;
- (c) the respondent only late in the day before the hearing received a compliance with its request for particulars and should be granted an adjournment to prepare its case.

3. In dealing with (a) above, it is necessary to paint the factual background. The complaint was filed on July 4, 1977 and on July 15, 1977, the Labour Relations Officer appointed by the Board on July 8, 1977 met with an official of the respondent and, at that meeting, handed him a letter dated July 8th from the Deputy Registrar enclosing a copy of his appointment, a copy of the complaint and a notice of hearing dated July 8, 1977. The respondent argues that the Labour Relations Officer, having proceeded under Rule 29(2)(b) must then elect to proceed under Rule 29(3)(a) or (b) and that since the notice of hearing had been prepared prior to the meeting and delivered at that meeting, the Board's Rule had not been complied with because it is patent that the Officer neither reported his findings to the Board or, subsequent to his meeting, referred the matter to the Registrar for the Registrar to issue a notice of hearing (that, in fact, having already been done).

4. The Board ruled against the objection. The rationale of the *ICB Warehousing* case clearly establishes that there is no requirement for a complainant under section 79(4)(a) to make out a *prima facie* case and Board Rule No. 46, which is designed to give the Board the discretion to weed out groundless claims, cannot be said to have re-imposed an obligation on the complainant to make out a *prima facie* case. Nor is the respondent's contention that the timing of the issuance of the Notice of Hearing in this instance precluded the effective operation of Rule 46. The fact is that as a matter of administrative efficiency in the expeditious handling of applications, it is the practice of the Registrar to set an application down for a specific hearing date at the time the application is filed. This does not interfere with the continuing functioning of other procedural mechanisms of the Board and does not preclude the possibility that the matter may be removed from the Board's docket prior to reaching the actual hearing.

5. In respect to the objection of the respondent outlined in (b) above, the Board has

many times pointed out that the issue involved in an allegation of discharge of an employee in contravention of The Labour Relations Act is quite different from an allegation of discharge in contravention of a collective agreement and the Board will invariably take jurisdiction in respect to a discharge alleged to be founded in a contravention of the Act. In all previous cases where this issue has been raised, it has been the existence of the alternative remedy of arbitration provided for in a collective agreement which has been the basis of the contention. That arbitration procedure is imposed upon the parties by section 37 of The Labour Relations Act and reflects a legislative preference for this form of statutory tribunal as the means for resolving collective agreement disputes. In the instant case, there is no collective agreement but a private arbitration procedure set up by Company policy. The Board was of the opinion that this is not a sufficiently adequate alternative remedy as to cause it to depart from its usual practice.

6. In respect to the objection founded on the supply of particulars, the Board was of the opinion that the respondent's request for particulars which was answered the same day by the complainant has been fully satisfied. The Board is further of the opinion that no prejudice to the respondent in the preparation of its case has arisen.

7. The respondent company, in December 1974, opened a newly-constructed distribution centre in Bramalea. This installation services some 168 stores throughout Canada and consists of some 900,000 square feet of warehousing. The new distribution centre was designed to replace its Progress Avenue centre consisting of some 267,000 square feet.

8. Early in 1975, the complainant submitted an application for certification (Board File No. 0084-75-R) and the Board in its decision of June 23, 1975 found that the 33 employees in the bargaining unit at the date of application represented only thirty per cent of the anticipated work force. The Board consequently directed the holding of a representative vote when a substantial and representative segment of the work force would be present. Subsequently, in February 1976, a certification of the complainant was issued.

9. In June of 1976 a strike took place in the bargaining unit and continued until December 7, 1976, at which time a Memorandum of Understanding between the complainant and the respondent was executed. By the Memorandum the respondent agreed to recall, progressively over the period December 13, 1976 to January 4, 1977, some 30 employees remaining on strike and the complainant agreed to abandon its rights to bargain collectively and such other rights as it might have "arising either directly or indirectly" out of the Board's certificate.

10. The recall was accomplished by four separate groups starting work on four separate days. Prior to each group starting work, they met with the Director of the Centre, Seunik, (except for the last group), Peters (the Personnel Director) and the supervisors of the men affected. Seunik (and in the case of the last group, Peters) addressed the returning employees, pointing out that while there were different camps, that is, those who had not joined the strike, those who had gone on strike and returned and those who remained on strike, all the past was behind and the objective was now for everyone to get along together. Copies of the Rules and Regulations were distributed at the meeting. Seunik stated in his evidence his objective was to make the Centre a good place to work for everyone. He further stated that at this point he recognized two prime objectives he had to accomplish, namely, "to improve the employee relationship through the Employee Handbook and to re-

gain the confidence of our Buying Office to use the Distribution Centre". Fabian's version of the meeting he attended was that Peters had said "anybody who has anything to do with the Union or the signing of cards will be dismissed". Peters himself in evidence directly denies any such statement. Fabian admits that no such statement was made to the other groups, and Fabian's statement was not corroborated by one of the attending supervisors.

11. On June 23, 1977, the complainant union commenced a new organizational drive.

12. On June 27, 1977, 37 employees (the grievors herein) were laid off; 38 employees continued to be employed. The layoff was stated to be indefinite in duration and, the respondent being of the opinion that it would extend beyond 13 weeks, provided all laid-off employees with severance pay (in lieu of notice) as required by the Employment Standards Act. The layoff was conducted in strict accordance with seniority and the employees were told they would be recalled in order of seniority.

13. The respondent, in support of its contention that the work force curtailment was based solely on normal business reasons, adduced evidence of the unsatisfactory operation at the Distribution Centre over its entire history. This performance, as might be expected, was the subject of continuous managerial review and culminated in a directive to the Director of the Distribution Centre, on June 23, 1977, to bring costs in line with the volumes. This directive came from the company's Operations Committee comprised of all company Vice-Presidents (and chaired by the President) who monthly reviewed the operating results of all profit and/or cost centres.

14. The evidence establishes that following the opening of the Distribution Centre in December 1974, they encountered start-up problems centering around a new sophisticated computer system (with which they were not familiar), the staggered transfer of work over a period of time from the old Centre at Progress Avenue, labour problems, and inadequate engineering of warehouse layout and methods. During this period the stores and head office executives understandably did not develop any confidence in the ability of the Centre to effectively perform. Evidence was also given that during the 1976 strike (some six months in duration) the Company, in its effort to keep operations moving, diverted directly to the stores a good deal of merchandise which would normally have gone through the Distribution Centre for transshipment to stores. Following the settlement of the strike, we are told that this diversionary period had demonstrated to the buyers of the Company that direct shipments were less costly in many instances than utilizing the Distribution Centre and that, therefore, the volumes on which the Distribution Centre operation had been based were not being attained with the consequent under-utilization of the Distribution Centre's work force.

15. The evidence also establishes that on November 29, 1976, by posting of a notice to all employees, the Company decided that, in order to improve its employee relations, to set up a Committee, chaired by the Director of the Distribution Centre, and comprised of an equal number of management and elected employee representatives. The Committee developed an employee handbook covering the details of Company policy respecting wages, benefits, working conditions, seniority provisions, procedures on layoff and recall, etc. and included a five-step complaint procedure terminating in an arbitration procedure. The arbitrator is not otherwise connected with the Company, and his decision is intended to be final and binding. All costs of arbitration would be borne by the Company. As we have indicated

in dealing with the preliminary objections of the respondent, we do not view this vehicle, in itself, as having any significance to the issue before us.

16. The evidence is that from January 1977 onwards the Distribution Centre was overstaffed for the work volumes. The Distribution Centre's management, because it hoped for an increase in volumes and because they considered it an integral part of their need to build up the level of employee relations, embarked on a "make work" program, utilizing the excess employees in such jobs as cleaning up the grounds, painting of buildings and equipment, pallet repair, etc.

17. The Company operates on four and five-week accounting periods with operating results coming available immediately at the close of a period (accounting weeks run from Thursday to Wednesday). It is the practice for the Company's Operations Committee to review all operating results starting immediately on the availability of the statistics. Consequently, on the Thursday morning following the close of an accounting period, the Director of the Distribution Centre would regularly meet with the Committee to participate in this review. On March 30, 1977, following the review of the preceding week, the Director wrote to Prange, V.P. Merchandising (to whom the buyers and store managers report) with a copy to the Company's President, in which he stated:

"We are still missing a lot of merchandise that was previously carried in the Distribution Centre and would appreciate some guidelines as to when we will receive more merchandise".

Prior to this letter, Seunik, Director of the Distribution Centre, had been in frequent contact with the buyers in an endeavour to have them place more volume in the Centre. According to Seunik, he received assurances from Prange that this would be forthcoming.

18. On April 22, Seunik decided that there would be a layoff of 5 men, an additional 5 men were placed on short hours and a general offer was made to all employees to grant voluntary personal leaves of absence on request. The employees affected by layoff received a letter stating they would be laid off between April 25, 1977 and June 20, 1977.

19. On April 27, Seunik again wrote to Prange, again with a copy to the President, pointing out that the Centre was then operating with approximately 33½% reduction of work hours (represented by 23 regular and 20 temporary employees less) from the same period the previous year. Seunik also pointed out that forecasted volumes for the May period would continue to be substantially behind the preceding year and stating:

"With all this profitable volume available it is hard to understand why volume should be a problem in this facility at any time".

20. On April 28, Seunik had the regular monthly meeting with the Operations Committee and, at that time, in his words, he had "three things going for me, justifying the operation of the Distribution Centre", namely,

- (a) the promise of additional volume;
- (b) the actions of April 22 demonstrating an attempt to bring costs in line; and

(c) the letter of April 27 drawing attention to the lack of co-operation.

As a result, the Committee generally agreed to wait and see whether results would improve in the next month.

21. The next accounting period ended on May 25th with the consequent Operations Committee meeting held on May 26th. According to Seunik, all he did at that meeting was "to buy another month" with the commitment that "if volume doesn't improve, I would bring the costs in line with volume". No evidence was presented to the Board as to the reasons (if any) discussed by the Operating Committee for the declining volume nor a forward forecast of volumes. No evidence was introduced as to the status of Mr. Prange's assurances to Seunik of increased volume. It must be noted that the buyers were under the direction of Prange. Volumes must surely have been a most significant factor in Operations Committee discussions, particularly when the April results for 1977 were off some 45% over April 1976, and that this represented an interruption in what had been a favourable trend.

22. On June 1, Seunik attended a meeting of the Distribution Centre Committee at the close of which he reviewed the estimated profit report for May and outlined the problems he was having in getting volume. The question was raised about further layoffs and Seunik told them "that we would not have a layoff at that time but if business continues in this manner, something would have to be done".

23. On June 23 the regular monthly meeting was held with the Operations Committee and, according to Seunik, "we reviewed the March, April and May meetings and the decision was that there would be no further extensions to bringing costs into line. I advised the Committee that in order to do this, my analysis of the past three months showed a cut of between 1400 – 1500 hours per week necessary".

24. On June 23, four employees, including Mr. Ed. Fabian, started to sign up employees in Teamsters Local 419. According to the evidence, this was done both at work and by home visitations and by June 26, some 28 cards had been signed. On June 24, Seunik received a phone call from Prostaby, the Distribution Centre's Manager, stating "he heard rumours that another campaign to unionize the Distribution Centre was going on. He indicated it was Teamsters 419". As a result of this call Seunik, who had been intending to go out to the Centre on the afternoon of June 24 to announce the layoffs, withheld this action in favour of taking legal advice which was done over the weekend on June 25. Seunik stated that the phone call from Prostaby was not the first intimation of union activity since the strike; that there had been previous rumours of union campaigns and that once in May and once in June, he himself had heard from employees "the same guys are starting it all over again".

25. The meeting with Company counsel on June 25 was attended by Seunik and Prostaby and resulted in letters of notification to employees affected by the proposed layoff being drafted by counsel. Seunik advised counsel that the layoff would be lengthy and was advised that since the duration was indefinite, he had the choice of waiting 13 weeks and then paying the legally required severance allowances, or to pay them immediately. Seunik stated he "felt it was a good thing to pay them at that time" and that he never considered keeping the men at work during the notice period because he was not aware that he had such an alternative available to him.

26. On Monday, June 27, Mr. Roy Westbrook, the Assistant Manager of the Distribution Centre, testified that when he came into work that morning Evans, the foreman, told him "there's Union rumbles again". Evans told him that someone had been approached at home and Westbrook assumed that the employee had informed Evans. Fabian testified that when he came to work on June 27, he was being followed around by Jack Evans, the general foreman. Fabian was employed as a tugger operator and his job necessarily took him all around the warehouse. Evans' responsibility encompassed the total warehouse. It would be natural that the paths of Fabian and Evans would cross during the day, but Fabian testified that on June 27 the number of "contacts" was greater than normal.

27. Sid Soullierre, an order filler, testified that he had been approached in the parking lot on his way in to work on June 27 in company with two other men, and asked to sign a union card. His response was that he would "think about it". By the 10:00 a.m. break, Soullierre had reached a conclusion and asked one of the men if he had a card to sign but he didn't. Later on that morning, Soullierre was approached at his work station by Fabian who gave him a card.

28. As Soullierre handed the card back to Fabian, Evans suddenly appeared and took the card from Fabian's hand with the words "give me that". Evans said, "Just what I thought. You know what this means don't you". Evans then directed Fabian to follow him to the office which he did.

29. On arrival at Westbrook's office, Westbrook was not present and was paged over the loudspeaker. On Westbrook's arrival at the office, Evans handed him the card and, according to Fabian's testimony, said "the Teamsters didn't have enough, eh?" According to Westbrook's testimony, "I might have said 'not again' but that's all I might have said. Very little was said". Westbrook phoned the Manager, Prostaby, and said, "I'll be down at your office, I can't say anything over the phone". As Westbrook was leaving, according to Fabian's testimony, Evans said, "Don't forget the guy on the card", to which Westbrook replied, "No, he's going too". Westbrook, in his evidence, says he believes Evans said "there's two men involved" but denied any reply of "he's going too".

30. Westbrook testified that he went to Prostaby's office and handed him the card, telling him that the man involved was Ed Fabian. Prostaby said nothing but dialled through to Head Office and had a conversation which Westbrook didn't hear. Prostaby then handed the card back to Westbrook and instructed him to give it back to the man and tell him to go back to work.

31. During Westbrook's absence of some fifteen minutes, Fabian and Evans had a conversation during which Evans said, "You're a good guy. Why would you do something like that? I could have let you go many times and didn't. I can't get you out of this one". On Westbrook's return, Evans asked, "Are they going?" to which Westbrook shook his head. Westbrook handed the card to Fabian and said, "Here's your card back. Go on back to work".

32. This event took place around 11:30 a.m. and later on, after lunch, there was a further encounter of Westbrook, Evans and Fabian. Westbrook testified that the encounter was fortuitous as they were going through the doorway between Receiving and Shipping. Fabian's testimony was that he was sitting on his tugger about 150 yards from Westbrook

and Evans who were in the doorway looking at him. Westbrook and Evans rode towards him on their bicycles and came up on either side of the tugger. Westbrook testified that Fabian initiated the conversation with, "there's a big joke around here. I was fired and hired the same day". Westbrook said, "You weren't fired so how could you be rehired?" Westbrook says he thinks Evans was with him. Fabian's testimony was that the conversation was initiated by Westbrook who said, "Are you going around telling people you were hired and fired the same day", to which Fabian replied, "You know how rumours are around here". Westbrook and Evans just looked at Fabian, said nothing, and rode off. We think the Fabian version of the episode is most likely.

33. Soullierre testified that after lunch that day he saw Evans and Westbrook riding towards him. Evans stopped beside him while Westbrook rode on. The following conversation ensued:

Evans:	That's a pretty stupid thing you did.
Soullierre:	What?
Evans:	Your signing that card. I saw the pen in your hand.
Soullierre:	I use the pen in my work. I'm an order filler.

Soullierre testified that he did, in fact, sign the card.

34. After lunch on June 27, Seunik, accompanied by Mr. Clarke, Vice President – Personnel, proceeded to the Distribution Centre where they met with Prostaby (and perhaps Westbrook). About 3:30 p.m. a meeting was held with the Distribution Centre Committee to explain the decision. According to Seunik, no objection was raised by anyone, and the Committee had felt basically that something had to be done for sometime. On the other hand, according to Mr. McDarby, a long-service employee and employee-member of the Committee who testified, "when it came up it was kind of a surprise to all of us that the Company was laying these men off. We were informed about 15 minutes before quitting time. We didn't know the full extent of the layoff till we got into the cafeteria".

35. A meeting was then held in the cafeteria with the total staff, at which Seunik explained the hard figures and need to make a layoff and that he felt badly about it. The question of recall came up and Seunik stated that this would be handled in accordance with the Employee's Handbook. The evidence is contradictory as to the specifics of numbers said to be affected at that meeting. It would appear that Seunik announced a layoff of 30 – 35 people (actually 37 were laid off). Following the meeting, each laid-off employee received an envelope containing the letter confirming his indefinite layoff.

36. There are a number of facts relating to the operation of the Distribution Centre which appeared in evidence and which have a bearing on a determination of whether the layoff of June 27 was solely for normal business reasons. These are:

- (a) In making this major capital investment in a new Distribution Centre, the Company apparently expected it would be staffed by some 100 bargaining unit employees and it was at the point of reaching that employee complement that the representation vote was held in 1976. This is further confirmed by the testimony of Mr. Beaulieu, Secretary-Treasurer of Local 419 who gave evidence that at the time of the strike in June 1976, the union calculated an original strike list of 99 employees.

There are currently 34 bargaining unit employees employed.

- (b) The Company evidence was that the Distribution Centre has never functioned well and that during the strike period of six months much merchandise which would normally have gone through the Centre was diverted into direct shipments to stores. Despite this, the dollar volumes shipped from the Centre in the fiscal year ending January 31, 1977 were 7.83% higher than the preceding fiscal year ending January 31, 1976. In the same period, the Centre's operating profits were up some 30.7% and labour costs as a percentage of dollar volumes shipped were down some 17.8%.
- (c) In January, February and March of 1977, the dollar volumes shipped were 98.77% of the dollar volumes shipped in the same months of 1976 and the labour costs percentage of the dollar volume in the three months of 1977 were improved by 1.31% over the same months of 1976.

Starting in April of 1977, there began a serious and dramatic decline in volume. In April 1977, the volumes were 45.7% less than in April 1976; in May 1977, the volumes were again down 58.7% from the volumes shipped in May 1976; and in June 1977, volumes were off 35.6% over June 1976. In total, in these three months, the 1977 volumes were down 47.3% over the same months in 1976.

In effect, while the total volumes for the period January to June 1977 are off 28.5% over the six months of 1976, the loss is entirely attributable to the months of April, May and June.

Labour costs in these latter three months, as a percentage of dollar volume, increased 24.5% over the preceding three-month period and were 45% higher than in 1976.

- (d) In respect to operating profits, the evidence in respect to January 1977 is not capable of interpretation. In February 1977 operating profits were 30.7% in advance of 1976 and in March 1977, were 26.77% in advance of 1976.

In April, as could be expected, the operating profits worsened substantially over 1976 and similarly in May and June.

- (e) The Distribution Centre is solely merchandised by the buyers in the Head Office who, it is testified, were forced to engage in a higher percentage of direct shipments during the strike period and demonstrated that this was a more profitable route than using the Centre. Consequently, buyers are reluctant to use the Centre. It was testified that any change in buyer policy in this regard would

take 30 – 90 days to work its way through and to become evident at the Centre level. Similarly, the Centre management, from its knowledge of orders in process, can make a fairly knowledgeable and accurate estimate of the work which will be flowing into the Centre two months in the future.

- (f) Considerable emphasis was given in evidence by the Company of the efforts made in the early part of the year to keep the employees busy on "make work" programs and to ignore obvious inefficiencies and thus to avoid layoffs. According to Westbrook, there would be 10 – 12 people engaged in "make work" projects and "the remaining people were busy (not pushed) on regular work". Westbrook also testified that discussions had been going on for 4 – 5 months before June 27 about ways of keeping the men busy and avoiding layoffs and that in his 37 years' experience layoffs were very rare and this layoff was unprecedented.

Jackson, an employee of 41 years, testified that January and February were always slack periods. The year-to-year comparisons of volumes and labour productivity of 1977 versus 1976 would seem to support this view.

37. Subsequent to the June 27th layoff, Fabian had a conversation following a ball game with Mr. Pitka, Shipping Supervisor. Fabian asked Pitka, in effect, whether it had been a bona fide layoff and, in Pitka's words, he replied, "Yes, it was. Things were pretty slow and the Company was carrying them as much as possible, and your signing a union card didn't help that much". Mr. Pitka made it clear that this was his opinion and that no one in the Company had said anything to him about this.

38. Also, subsequent to the layoff, three employees testified that, in their judgment, the Centre had become busier. This would seem to be confirmed by the Estimated Profit Report for July 1977 which shows the July volume to be 24.87% higher than the June 1977 volume. While of questionable cogency, it is also noted that July 1977 volume is 24.03% higher than July 1976. In this connection, Dempsey, Supervisor of Receiving, gave evidence: "I probably said in mid-June that things would pick up because mid-July to mid-September is our busy time of the year. That's the experience over the years".

39. Evidence was also given that following the June 27th layoff, there was some re-assignment of "bargaining unit" work to supervisors and others. Pitka testified that pre-June 27, he was spending 90% of his time on supervisory duties and post-June 27, only 60% of his time this way. Employees testified that this change was a general pattern. It was also given in evidence that an employee from the Data Room was doing bargaining unit work and that an employee of one of the cartage companies, in addition to loading his own truck, was helping in the loading of other trucks.

40. The respondent's evidence was that the pattern of supervisory work is no different than it was in the old Distribution Centre (although not previously in Bramalea); and that in respect to the cartage company employee, it had always been the practice, prior to 1975, for the carrier to supply his own loader and that the practice had been previously stopped at Bramalea.

41. The Board is faced with a determination as to whether the reduction in manpower was solely a normal business response to conditions beyond the company's control or, at least, to conditions shaped solely by normal business objectives. In assessing the factors of dollar shipments, labour productivity, levels of receiving and shipping activities, the detailed operating statements and other documents filed by the respondent are of prime cogency. These factors must be assessed in the light of the fact that the volumes available to the Distribution Centre are not a direct reflection of the general level of the respondent's business. They are not the result of the marketplace but are related solely to decisions as to the extent to which use will be made of the Distribution Centre's facilities made elsewhere in the respondent's organization.

42. As has been previously noted, the Distribution Centre is solely merchandised by the buyers in Head Office. The buyers report to Mr. Prange, Vice-President Merchandising. Mr. Seunik's testimony, which we accept, was to the effect that the buyer is generally an executive with many years' experience in the industry who must exercise a high degree of independence in operation and, in making commitments for the company, coupled with an exercise of judgmental factors covering all aspects of merchandising and whose performance is evaluated on the ultimate profitability of his "buys". A critical consideration, insofar as this application is concerned, is the extent to which buyers can improve their own profitability performance by a decision to either use the Distribution Centre's services or to have merchandise shipped directly to the stores. Even more critical to this consideration is the organizational balancing of the buyers' own performance against overall corporate objectives and profitability.

43. Mr. Seunik also testified that "at the Toronto Office level they had discussed over the years different avenues of supplying stores but had not been forced to take the step. When the strike occurred...direct shipment to the stores was established. As it turned out after 3 or 4 months this was a much more profitable route than the Distribution Centre Route". As a consequence of this experience, it was testified that even after the strike settlement, the buyers continued to use the more favourable avenue.

44. After the settlement of the strike and since February 1, 1977, in Seunik's words, there were "literally scores of meetings" with buyers, with Prange, and with the President, Mr. Lawson, "trying to win back their confidence to put merchandise back into the Distribution Centre". Seunik testified that he had an assurance from Prange that this would be done, but either because of a breakdown in communications between Prange and the buyers or for some other reason, Seunik felt that the assurance was not being implemented. Consequently, on April 27th, Seunik again wrote to Prange and to the President pointing out that the Distribution Centre was then operating with approximately a 33% reduction in work hours over the previous year, and expressing his assessment of the operation in the following words:

"If the pattern continues we will do less than 10% of our total volume in our Distribution Centre. With all this profitable volume available it is hard to understand why volume should be a problem in this facility at any time. It is my opinion that we should never allow this operation to lose profits because we can control it and have a volume of nearly six hundred million dollars to do it with."

(underlining is the Board's)

45. In assessing the impact of diversion of merchandise from the Centre and its impact on the Centre's operations, we can only extrapolate from the financial and operating data supplied by the respondent. In so doing, it must be recognized that there may be very wide variations on a month-to-month basis but over longer periods there should be true comparability. We find that during the strike months of August through November 1976, (we exclude December because the physical inventory, by the respondent's testimony, made it atypical) and using dollar shipment volumes as the sole indicia, that the volumes not only equalled, but slightly exceeded those of the preceding year. This, despite the fact that one would believe that during this period the company would have exercised its maximum diversion of merchandise and irrespective of its economic impact. It may be that diverted merchandise was replaced by merchandise of different types – no explanation was offered in this regard.

46. The result of the company's merchandising policy during the fiscal year, which included the six-month strike, resulted in an 8% increase in dollar shipments through the Centre and in a 31% increase in the Centre's profitability.

47. In the three months following the strike settlement, January to March 1977, we also find that the shipping volumes continued to follow the previous pattern and were almost identical to those of the same months in 1976. This would indicate the continuation of the respondent's strike period merchandising policy flowing through into these three months, (it being noted that any change in the policy of merchandising the warehouse would take 30 – 90 days to become evident in the activities of the Centre). It should also be noted that during this three-month period, both shipping volumes and the Centre's profitability showed a marginal increase over the performance of the previous year.

48. In the face of these year-to-year comparisons, the conclusion is inescapable that the reduction of volumes in the next three months (April through June 1977) of over 45% compared to the same months in 1976, was the result, not of continuing the respondent's strike period merchandising policy, but of some deliberate new direction on the part of the respondent. It must also be noted that this new direction had to be initiated early in the year and shortly after the return to work of the strikers in order to be evidenced in the April through June period.

49. The crucial question is whether the change in merchandising the Warehouse, starting in late January, was solely related to the testing, by the buyers, of maximizing the profitability of their "buys" as testified, or was there some anti-union motivation. In cases such as this, the Board, in the case of the *Barrie Examiner*, [1975] OLRB Rep. Oct. 745 at paragraph 17 sets out the evidentiary requirements as follows:

"Given the requirement that there be absolutely no anti-union motive; the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred".

As has been noted, the parties here engaged in a long and bitter strike culminating in a

strike settlement, which included an agreement by the union to abandon all of its bargaining rights. It is evident on the face of events that there is "little love lost" between the parties.

50. This recognition of the obvious does not, however, in itself, justify the inference that the respondent permitted its feelings to flow through to a breach of The Labour Relations Act. The evidence which we have heard shows that the warehouse management (through Seunik) went to great lengths to secure a change in the buyers' direction (and thereby to avoid layoffs). The Board does not think it probable that the buyers themselves were acting out of some anti-union motive, their motivation has to be their own performance as measured by the profitability of their buys. In order for their activities to take on an anti-union colouration, it seems clear to us that it would have to be as a result of general management issuing an instruction to buyers to bypass the Warehouse. There is no evidence of such an instruction and, in the total context of events, it is difficult to conceive what objectives might have been accomplished by the respondent if such an instruction had indeed been issued.

51. In late January 1977, the union had completely removed itself from any ongoing relationship and had no "presence" of any kind at the Distribution Centre. A long strike had been lost. It is not credible to believe that the respondent would feel that it would require additional action on its part to discourage employee interest in the union. Similarly, the fact that during this period the respondent was publicly establishing within the Distribution Centre a seniority policy militates against the conclusion that perhaps the respondent was having second thoughts about the wisdom of having brought back those employees still on strike. Such an inference is negated where the layoff was done in strict seniority and therefore could not affect more than approximately 50% of the striker group. Additionally, the laid-off employees were told that they would be recalled in strict order of seniority which, again, precludes the selective treatment which would be necessary if the respondent were to accomplish an anti-union objective.

52. We did not hear any direct evidence as to why Prange did not produce on his commitment to Seunik to channel more volume into the Centre. Perhaps he changed his mind as to the total benefits to be achieved or perhaps he was using a gradual approach. If he were to effect a change in the buyers' activities, it is clear that it could be done in two possible ways - first, by direct instruction; or second, by endeavouring to reason and persuade. Obviously, the second alternative would be a slower and more gradual way of effecting a change. Just as obviously, to follow the "direct instruction" route could have achieved quicker results; but, having regard to the nature of the buyers' responsibilities, would have had an adverse impact on future performance. The postponement of an Operations Committee decision to bring the costs in line in April and in May is consistent with the theory that Prange was utilizing the "reason and persuasion" approach.

53. This is one of those cases in which the determination must be based on inferential reasoning. We are concerned solely with the employer's motivation in effecting the lay-off of June 27 and which, in our finding, was dictated by the change in work volumes arising out of the buyers' activities. On the balance of probabilities, we are satisfied that the buyers' activities were motivated solely by business reasons.

54. At the hearing, considerable evidence, both documentary and oral, was adduced

by both parties to establish the business necessity to reduce the work force by 50% on June 27, 1977. The complainant argues that the layoff was much greater than would be justified solely on the basis of dollar shipments and the wages-to-sales ratio, and further argues that several other indices of total work load further emphasize this difference. The complainant also argues that these latter indicia were also a clear indication of future volume increases in July and August.

55. The respondent determined the magnitude of the layoff by using a wages-to-sales ratio of 2.15, which was the ratio achieved in April 1976. It is true, as the complainant argues, that April 1976 was an exceptionally good month (although not the best of 1976). We must note that this monthly ratio is subject to very wide swings, e.g. in fiscal 1976, it varied from a monthly low of 1.62% to a monthly high of 3.74%. The target selected of April 1976 (2.15%) did indeed represent an ambitious standard; in fact, the average of three months of April, May and June 1976 was 2.59% and was precisely the same as the cumulative average for the full 1976 year. The 1976 yearly average was a marked reduction over the 1975 year's average of 3.16%. It is not within the province of this Board to judge the validity of the standard set. However, we can and do draw the inference that such a standard establishes a much more onerous workload than that which the company has previously achieved. By selecting the performance of a single month in the three-month period as the target, the company, which was most conscious of the month-to-month fluctuations in its operation, was obviously maximizing the layoff.

56. Concurrent with the June 27th layoff, the company, by a change in utilization of "non-bargaining unit" employees (as it was perfectly entitled to do), picked up any imbalance of workload in the "bargaining unit" which resulted from the layoff. Supervisory staff which had been spending 90% of their time supervising and 10% working now spend 60% of their time in supervising and 40% in working; an employee formerly employed in the Data Room now drives a fork truck; a non-employee of the respondent but an employee of an outside cartage company is on the premises all day and, in addition to loading his own trailer, voluntarily assists in the loading of other trailers. All of these changes led to maximizing the layoff in the bargaining unit and represent a complete about-face in the respondent's previous long-standing attitude to layoffs.

57. A plethora of statistical evidence was filed by the respondent respecting other indicia from which level of current and future workload might be assessed. These include "picks" (both re-pack and case), cartons shipped, cartons received. The weighting of these individual factors in the total mix, which is continually varying, leading to total workload, is beyond the expertise of this Board without further extensive enquiries. Additionally, we believe in the absence of bad faith, that it is not within the purview of this Board to substitute its judgment in respect to workload for that of the respondent.

58. The Board must evaluate the events of June 23rd to June 27th in the context of the prior relationships of the parties. The Union not only lost the strike called in June 1976, but abandoned its bargaining rights in order to settle it. The evidence is that the respondent (through Seunik) took steps to heal the wounds and to establish an integrated work force with a good level of employee relations. The Distribution Centre Committee may or may not have been a viable vehicle – but it was a vehicle; the "make work" program during early 1977 was a continuation of the company's long-standing policy of making layoffs only in most extreme circumstances; the establishment of written employee relations policies, in-

cluding a complaint procedure, all go in this general direction. These were primarily the result of Seunik's efforts. Whether there was general management support for the Seunik initiative remains a matter of speculation. It must be noted that throughout the term of most of these efforts, it was already evident that a major volume reduction would be effected.

59. Based on Seunik's testimony, he was, from February onwards, under pressure from the Operations Committee to bring his costs in line, which he sought strenuously to do, not by cost cutting, but through endeavouring to effect a change in the buyers' merchandising policies which Seunik knew were presaging a dismal workload starting in April. Seunik testified that in March he had discussions about layoffs with the Distribution Centre's Manager almost daily, but because they had never had layoffs in the past in the Distribution Centre and because he felt that it would be the wrong way of demonstrating his sincerity about improving relations, no action was taken. In any event, in April Seunik succumbed to the pressure and instituted a layoff of 5 employees on April 25th. The announcement of the layoff was made to the Distribution Centre Committee and to employees generally on April 22nd. In addition to the layoff, 5 more employees were put on short time and employees generally were invited to take voluntary leaves of absence.

60. During this period of January through April, we are told by Fabian that there had been rumours of a new union campaign and that there had been some individual talks about organizing in April but it was not until June 23rd that the organizing group launched the all-out drive. Seunik confirmed that he had heard of the rumours in May and June directly from employees that "the same guys are starting it all over again".

61. The evidence establishes that the level of volumes clearly justified some adjustment to the work force, and that the layoff itself, as well as the number of man-hours to be removed from the operation, was decided at the Company's Operations Committee Meeting which took place first thing on the morning of June 23, 1977. The timing of this meeting was in accordance with long-standing Company practice to review operating results as soon as they came available. There is no evidence that at this time the respondent was aware that the complainant was also, on that day, launching a new organizing campaign. We accept the fact that the sole reason for the decision was to bring costs in line with the volumes. The complainant argues that the announcement of layoff on June 27th was shaped on the magnitude of its impact by respondent's knowledge of the start of a new organizing campaign and by the events of June 27th revolving around the Fabian incident. The respondent, however, provided a credible explanation for its delay of the layoff announcement from the originally intended date of June 24th to June 27th and the evidence does not justify a conclusion that the decision implemented on June 27th was not the decision which had been arrived at on June 23rd. Whether that decision resulted in more employees being laid off than the then current and projected future events indicated as necessary, is a matter of opinion. The important element is that the decision to implement the layoff and to reduce 1400 - 1500 man-hours was made at a time when the respondent had no knowledge of the new organizing campaign. Under such circumstances, the respondent cannot be taxed with any anti-union animus to interfere in the organizing campaign in arriving at its decision.

62. Subsequent to the hearing and prior to a decision being issued, the complainant, on November 8, 1977 by letter to the Board, requested that further evidence, not available at the time of the hearing and which had come to the complainant's attention, be heard by the Board.

63. The nature of the further evidence would go to the subsequent recall of laid-off employees and to the utilization by the respondent of an organization known as Cochrane-Dunlop Limited, as an alternative distribution channel, starting in December 1976.

64. The respondent was invited to comment on the request for a continuation of hearing.

65. The Board is of the opinion that the subsequent events referred to by the complainant are not relevant to the issue and that the utilization of Cochrane-Dunlop Limited was not a recent factor in the respondent's operations and did not affect the explanation offered by the respondent for the declining volumes in the Distribution Centre.

66. The request for permission to present additional evidence at this stage is refused.

67. The complaint is dismissed.

Decision of Board Member Harry Simon:

1. I fail to agree that the 37 employees were Terminated on June 27, for Business reasons. All the evidence contradicts this assertion made by the Respondent.

Only 1 week prior to the lay off the Company had recalled 5 employees who were on lay off for several weeks.

The busy season of the year was approaching, more volume is handled by the Distribution Centre, July to October when the stores normally stock up for Fall and Christmas season. The Company is operating 110 stores, 10 more than in the previous year and is continually expanding.

The volume of merchandise handled by the Distribution Centre in July, 1977 was by 24% higher than for the same period in 1976. Operating profits were also higher in the first 3 months of the year than for the same period in 1976. In my view the profit and loss position of the Distribution Centre can not be measured on a monthly basis, to be fair, it must be done on a yearly basis. As a matter of fact the operational profits of the Distribution Centre for the fiscal year ending January 31st, 1977, were 30% higher than for the same period for the previous year.

2. I fail to accept the proposition that the buyers determine Company policy as to whether merchandise is shipped through the Distribution Centre or direct to the stores, this policy has to emanate from top management and they bear the full responsibility for such policy.

The Distribution Centre is a 12 million dollar investment by the Company and the Buyers must conform to established Company policies to make the Distribution Centre a valuable and profitable operation. To quote Mr. Seunik, the manager of the Distribution Centre, "With all this profitable volume available it is hard to understand why volume should be a problem in this facility at any time. It is my opinion that we should never allow this operation to lose profits because we can control it and have a volume of nearly six hundred million dollars to do it with". The question posed by Mr. Seunik was never answered

to the Board. We heard no evidence by any of the top management of the Company who determine policy for the Company including the Distribution Centre.

3. The anti union attitude of the Company has been well established. The 6 month strike which the same Union carried on against the Company in 1976 and which the union was able to settle only on conditions that they abandon their Bargaining rights attests to the Company's animosity towards the union.

The setting up of the "Distribution Centre Committee" with equal representations by the Employees and the Company of which Mr. Seunik was the Chairman, and whose Rules and Constitution he drafted was only an attempt to deceive the Employees and make them believe that they have someone to represent them in dealing with management. It did not take too long for the Employees to become disillusioned in the Distribution Centre Committee as testified by 2 employee members of the Committee.

By Mr. Seunik's own evidence he knew in May about the Union making a new attempt to organize the Employees, when he was told by his supervisor "the same guys are starting it all over again."

4. There is no doubt in my mind that the Company was following very carefully the new organizing attempts by the Union. The incident with Fabian and Seullierre which occurred on June 27th, the day of the lay off is proof of that. Evans following Fabian every step the same morning, his reaction when he grabbed the card from Fabian's hand; his statement to Fabian "you know what that means don't you?" We also have Mr. Westbrook's statement when Evans handed him the card which he had taken from Fabian "the teamsters didn't have enough, eh?" following which Evans said to Westbrook "don't forget the guy on the Card," to which Westbrook replied "he is going too," and in conclusion, Evans statement to Fabian when they were still in Westbrook's office "why would you do something like that? I could have let you go many times and didn't, I can't get you out of this one."

5. There has been no supporting evidence to Mr. Seunik's testimony that the decision to lay off 37 employees was made at a meeting of the operations Committee June 23rd and that he delayed the implementation of this decision until Monday June 27th in order to consult with his lawyer when he found out on the same day about the Union's organizing drive. This is in complete contradiction to his testimony that he had heard about the union organizing drive previously in May and early June. Mr. Seunik's credibility has been further undermined by his testimony that he did not know that he could ask the Employees to work off their notice. I refuse to accept his testimony since he spent 2 full days with his lawyer discussing the lay off.

The lay off was a complete surprise not only to the members of the "Distribution Centre Committee" but also to the management and supervisory personnel of the Centre. The Committee were informed of the lay offs around 3:00 p.m. and the Employees were advised of the same about 30 minutes later. This procedure was a complete reversal of procedure followed in April when 5 employees were laid off. The Committee were then advised several days in advance and the employees were given adequate notice of the lay off.

6. The decision to pay the employees severance pay instead of the required notice is strange to say the least. Especially from a company who claims that they are losing thou-

sand of dollars on the operation of the Distribution Centre. One would think that the sensible thing would have been to let the Employees work off their notice. I must therefore conclude that the Company knew what they were doing. The lay off was planned to get rid of the most active union supporters and to scare the balance of the Employees away from the Union.

7. The majority in their decision are prepared to accept the proposition that there are 2 levels of management in conflict with each other. One is Mr. Seunik the manager of the Distribution Centre who is doing his outmost to keep the Distribution Centre in full operation, while he is hindered in his efforts by the other level of management, known as the "Operation Committee" who fail to cooperate with him for reasons undisclosed to the Board. Furthermore we are made to believe that the real culprits are the Buyers who on their own refuse to send the merchandise through the Distribution Centre. I fail to agree that management of such well known and well organized Company operates in such archiac manner, that one hand doesn't know what the other is doing.

8. In my view the Company had an obligation to inform the Board of its arrangement to ship merchandise to its store through Cochrane-Dunlop Ltd. The withholding of this information from the Board casts further doubts about the Company's intentions in Terminating the 37 Employees.

The Board has ruled in previous cases where the onus of proof is on the Respondent and where there is a balance of probability the decision must go in favour of the grievor.

9. For all of the above reasons I would therefore find that the Respondent has violated sections 58, 61 and 63 of the Act and direct that all grievors laid off on June 27th, 1977 be fully reinstated in Employment and be compensated for all lost wages.

1156-77-R International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local #210, (Applicant), v. F. Lepper & Son Ltd., (Respondent), v. Group of Employees, (Objectors).

Certification – Buildup – When representation vote will be deferred.

BEFORE: Pamela C. Picher, Vice-Chairman, and Board Members F. D. Kean and Wm. F. Rutherford.

APPEARANCES: *Marcel Beauregard and Benard VanDeszande for the applicant; Harry Freedman, Karl Maier and Peter Juhasz for the respondent; Bob Hollands and Gaspar Bozsik for the objectors.*

DECISION OF THE BOARD; December 14, 1977.

1. The name: "F. Lepper & Son's" appearing in the style of cause of this application as the name of the respondent is amended to read: "F. Lepper & Son Ltd.".

2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.
4. The Board further finds that all employees of F. Lepper & Son Ltd. in the Town of Napanee, save and except foremen, persons above the rank of foreman, office staff and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.
5. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on November 1, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
6. Ordinarily with membership evidence of not less than forty-five per cent the Board orders the taking, forthwith, of a representation vote. In this case, however, counsel for the respondent alleged that because of a planned build-up of employees the application was premature.
7. The respondent is engaged in the manufacturing of heavy equipment for use in the steel industry. It takes approximately eighteen months for the completion of an order. The respondent has an established plant in Toronto but in January, 1977 opened a plant in Napanee. Work began in the Napanee plant in March, 1977.
8. At the time of the application for certification, October 21, 1977, there were 28 employees. At the time of the certification hearing another employee had been added; the respondent projected the imminent hiring of 3 additional employees. Based on orders that have already been received, the respondent anticipates that it will have employed 65 employees by the end of June, 1978, a period of eight months from the date of this application. The respondent submitted in evidence work projection charts which illustrate, on a monthly basis, the degree of build-up in the labour force necessary to meet the existing work orders.
9. In deciding whether to postpone the taking of the representation vote because of the respondent's planned build-up of its work force, the Board must balance the rights of the 28 employees already employed at the time of the application with the rights of the future employees the respondent intends to hire over the next eight months. By delaying the vote, the existing employees are temporarily deprived of their opportunity to engage in collective bargaining. By ordering an immediate vote, however, the future employees would be deprived of their opportunity to participate in the selection of their own bargaining agent.
10. Over the years the Board has developed some guideposts to assist it in the balancing of the rights of these two groups of employees. *Firstly*, the Board requires that there be a real likelihood that a build-up will take place; there must be a firm plan for an imminent build-up. (See *Power Controls* [1967] OLRB Rep. Mar. 954, *Cameron Packing Inc.* [1972] OLRB Rep. Nov. 988, and *Canron* [1967] OLRB Rep. Sept. 750.) As well, the actualization of the build-up must be relatively certain. It should not, in other words, be dependent on

market factors well beyond the control of the employer. In *Travelaire Trailer Mfg. Ltd.*, [1970] OLRB Rep. Nov. 829, for example, the Board ruled that the planned build-up was not sufficiently firm to delay the vote because the build-up was almost totally dependent on the unstable market conditions in which the respondent's industry was engaged. The Board made a similar ruling in *Cameron Packaging Inc.*, (*supra*), where the projected build-up was dependent on the next year's market and competitive conditions. *Secondly*, the planned build-up must take place within a reasonable period of time. While each case must be decided on its own facts, we note that in *Vulcan Equipment*, [1974] OLRB Rep. May 285, a build-up over a period of seven months was allowed; in *United Asbestos*, [1974] OLRB Rep. April 234, a build-up over a period of some sixteen months was allowed. In *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637, on the other hand, a build-up spanning between one and five years was not allowed. *Thirdly*, to determine whether the existing group is sufficiently representative of the expected total, the Board looks to whether the employees employed at the time of the application constitute more than fifty per cent of the anticipated number of employees. If less than fifty per cent of the expected total are then employed, it is normally felt that the group is not sufficiently representative and that the application is therefore premature. (See *B. F. Goodrich Canada Limited*, [1970] OLRB Rep. Sept. 655; *Cornwall Spinners*, [1975] OLRB Rep. Sept. 693.) *Fourthly*, as another yardstick in determining the representative character of the existing work force, the Board looks to the proportion of projected classifications that are filled at the date of the application. (See *Ford Motor Co.*, [1967] OLRB Rep. Dec. 858, *Cornwall Spinners*, [*supra*] and *Sparton Tool & Mould Ltd.*, [1975] OLRB Rep. June 469.)

11. In the circumstances of this case the respondent has satisfied the Board that there is a real likelihood of a significant build-up of its employees within a reasonable time, that is, between the date of the application and the end of June, 1978. The anticipated build-up is based on orders that have already been received by the respondent. It is expected to increase the work force by more than fifty per cent and is intended to fill five classifications which are presently vacant. Having regard to all the evidence, the Board finds that the application is premature and declines to order a vote at this time.

12. To keep the Board informed as to the progress of the respondent's build-up, we direct the respondent to report forthwith to the Board on the numbers and occupational classifications of the persons within its employ. Succeeding reports should be submitted to the Board by the seventh day of each month, commencing with the month of January, 1978 and continuing until the Board otherwise directs. If the build-up does not progress as alleged by the respondent within the time specified, the Board will consider the membership position of the applicant as of the date of the application.

**1110-77-M Unifin Division KeepRite Products Ltd., (Employer), v.
International Union, United Automobile, Aerospace and Agricultural
Implement Workers of America, (Trade Union).**

Reference – Collective Agreement – Whether employer may ratify a memorandum of agreement after an A.I.B. rejection of its terms – Whether binding agreement created.

BEFORE: Donald D. Carter, Chairman, and Board Members M.J. Fenwick and W.H. Wightman.

APPEARANCES: *Janice A. Baker and G.T. Fenwick for the employer; B. Chercov, R. Nickerson and A. Seymour for the trade union.*

DECISION OF THE BOARD; December 9, 1977.

1. This is a reference under section 96 of the *Labour Relations Act*. The question referred to the Board by the Minister is whether she has authority under section 37(4) of the Act to make an appointment necessary to constitute a board of arbitration.

2. This reference requires the Board to address once again the troublesome issue of the extent to which a rollback by the Anti-Inflation Board disrupts the normal incidents of a collective bargaining relationship. The employer contended that, despite a rollback of a memorandum of settlement, a collective agreement incorporating that memorandum of settlement was reached subsequently and was in existence when the October 14th "day of protest" occurred. In these circumstances, the employer argued that the Minister had authority to set in motion the arbitration procedure under that collective agreement to deal with its grievance relating to the October 14th action. The union, however, characterized the situation as being quite different, arguing that, in the wake of the rollback, the memorandum of settlement never attained the status of a collective agreement and, therefore, there was no arbitration procedure to set in motion.

3. The memorandum incorporating the proposed settlement came into existence on November 15, 1975 and, although signed by the parties, was expressly made subject to ratification by both the union and the employer. In a decision dated June 18, 1976 (File No. 1865-75-U), this Board found that, as of March 11, 1976, the memorandum of settlement had not been transformed into a binding collective agreement because of a lack of ratification by the employer. This finding was based upon a statement made by G. Fenwick, the employer's general manager, in a letter sent to the Anti-Inflation Board, to the effect that final ratification of the proposed agreement by the employer was being withheld until the Anti-Inflation Board had ruled upon the settlement set out in the memorandum of agreement.

4. The response of the Anti Inflation Board was a ruling, dated January 19, 1976, rolling back the terms of the memorandum of settlement, which had been implemented, and giving the parties thirty days to agree to the implementation of the "rollback". Agreement, however, was not forthcoming, and the union took the position that any unilateral implementation of the rollback by the employer would be met by strike action. It was this strike threat, made on March 11, 1976, that the Board dealt with in its earlier decision and found

to be legal. In the circumstances, the Board held that the implementation of the terms of the memorandum of agreement on November 17, 1975 did not constitute a ratification by the employer, but was merely a response to an earlier threat of a legal strike by the union. The Board concluded that the parties had not entered into a binding collective agreement as of March 11, 1976, and that the employer's application for a declaration and direction in respect of the strike threat must be dismissed.

5. Following the Board's decision on June 23, 1976, the employer advised the union by telegram that it had ratified the memorandum of agreement. On that same day, but not in response to the telegram, the union informed the employer by letter that it was "prepared to continue the implementation of the Memorandum of Agreement reached between the parties on November 15, 1975, and as a result of the Labour Relations Board hearing the Union is hereby advising you that should any or part of the Memorandum not be implemented at any time we shall consider ourselves in the position of a legal strike similar to the situation that existed on November 15, 1976". At this point, it was clear that an impasse still existed between the parties over the implementation of the rollback, since the Anti-Inflation Board, in a telegram of June 8, 1976, advised the parties that, after a reconsideration of its earlier decision, it was confirming the original rollback. The employer was further advised by the Anti-Inflation Board that it was to consult with officials of the company before June 18, 1976 to vary the terms of the settlement, and to recover any compensation payments in excess of those permitted by that Board. The parties, after being advised of this decision, met once to discuss the rollback but no agreement was reached on its implementation. Still faced with the threat of a strike, the employer continued to implement the terms of the memorandum of agreement, and agreed to take an appeal to the Anti-Inflation Administrator. The ruling of the Administrator, confirming the Anti-Inflation Board's decision, was received on October 27, 1976.

6. Meanwhile, the parties had commenced negotiations for a new collective agreement to replace the memorandum of agreement, which expired on November 5, 1976. After the decision of the Administrator, the negotiations began in earnest, the two major issues being the implementation of the payback required by the *Anti-Inflation Act* and the monetary terms of the new collective agreement. The starting point for negotiations on this latter item was the level at which the wage rates in the memorandum of agreement had been rolled back. These negotiations, after a strike in January and February of 1977, eventually culminated in collective agreement, the terms of which were to be effective from November 6, 1976.

7. The question to be answered here is whether there was a collective agreement in existence on October 14, 1976, when the facts giving rise to the employer's grievance occurred. This Board has already found that, as of March 11, 1976, a collective agreement had not yet come into existence, since the necessary condition of ratification by the employer was lacking. There existed at the same time, however, another legal impediment to the memorandum of agreement – the intervention of the Anti-Inflation Board on January 19, 1976. The Labour Relations Board, in its earlier decision, having found a lack of ratification, did not deal with the second impediment, quite properly perceiving no need to expand the grounds upon which it rested its decision.

8. The effect of a rollback in situations where the parties have not contractually provided for that eventuality was not considered and determined by the Board until subsequent

cases. See *Croven Ltd.*, [1977] OLRB Rep. Mar. 162; *Libby, McNeill & Libby of Canada Ltd.*, [1977] OLRB Rep. Apr. 204. These decisions make it clear that the collective agreement in such situations only exists to the point of the rollback and, following the rollback, the agreement ceases to exist from that point forward. The parties are then put in a position where they must negotiate a successor collective agreement, if they wish to avoid remaining in the kind of labour relations limbo left by the operation of the *Anti-Inflation Act*.

9. Counsel for the employer argued that this analysis should not be applied to this particular case because the Board, although it might have done so, chose not to apply this reasoning to the earlier application. We have no hesitation in rejecting this submission. By confining itself to the more narrow ground, the Board did not in any way suggest that a rollback by the Anti-Inflation Board would not be an impediment to the memorandum of settlement being transformed into a collective agreement. Immediately following the Board's decisions, the employer must have been aware that the legal situation was unclear, since it was still faced with a strike threat. At that point, the employer could have returned to the Board, but chose not to do so. In these circumstances, we fail to see why the Board should be foreclosed from considering the impact of the rollback upon the collective agreement.

10. The initial rollback in January, the subsequent confirmation of this decision in June, and the unsuccessful appeal to the Administrator, had the effect of placing the collective bargaining relationship of the parties in limbo. After January 19, 1976, it was no longer legally possible for the employer to ratify and implement the memorandum of agreement because of the intervention of the Anti-Inflation Board rolling back the terms contained in the memorandum. At that point, the labour relations vacuum created by this ruling, could only be filled by the negotiation and formalization of a replacement collective agreement, or by a successful appeal. Neither event occurred. The appeals were unsuccessful, and a replacement collective agreement did not materialize. At all relevant times the union was maintaining the position that the memorandum of agreement should be implemented despite the rollback, a position that the employer, quite rightly, could not accept. No consensus was reached and, therefore, there was no collective agreement in existence when the October 14th walk-out occurred.

11. Our finding that there was no collective agreement in existence should not be construed as a condonation of the union's conduct. The union's rigid insistence upon continuing the terms of the original memorandum of agreement following the rollback appears to be a failure to bargain in good faith. The matter, however, is not before the Board as a bargaining complaint but as a reference under section 96 of the *Labour Relations Act* as to whether the Minister has jurisdiction to constitute a board of arbitration. The answer to this reference must depend upon whether, at the relevant time, there existed a collective agreement, and not upon whether the lack of a collective agreement resulted from improper bargaining conduct.

12. The Minister, therefore, is advised that, since there was no collective agreement between the parties when the facts giving rise to this grievance arose, she does not have authority to constitute a board of arbitration to deal with that grievance.

DECISION OF BOARD MEMBER M.J. FENWICK:

Although I agree with the conclusion reached by my colleagues, I wish to disassociate myself from the gratuitous remarks set out in para. 11.

**0725-77-R United Plant Guard Workers of America Local 1962,
(Applicant), v. Olympia & York Developments Limited, (Respondent).**

Certification – Membership Evidence – Effect of principal collector failing to collect required money payment from employee.

BEFORE: Rory F. Egan, Alternate Chairman, and Board Members F. W. Murray and M. J. Fenwick.

APPEARANCES: *Chris G. Paliare for the applicant; Louise Binder and John E. Crumb for the respondent.*

DECISION OF RORY F. EGAN, ALTERNATE CHAIRMAN, AND BOARD MEMBER F. W. MURRAY; December 21, 1977.

1. This is an application for certification in which it is alleged that Kenneth McMullen, an employee of the respondent, did not pay any money for initiation fees or dues with respect to a membership card signed by him and submitted by the applicant as evidence of membership in support of its application for certification. The Board directed an investigation into the matter.

2. McMullen testified that, on being approached by C. B. Singh, he signed an application for membership in the applicant union on July 27, 1977. McMullen signed the document twice. The first signature appears under Section 1 of the membership document which contains the request for membership and authorization to the applicant to bargain on behalf of the employee concerned. The second signature appears under the following statement in Section 2 of the document:

“I hereby certify that the amount shown below was paid by me as evidence of good faith in my application for membership in the International Union United Plant Guard Workers of America.”

Amount two xx/100 Dollars.”

Also, in Section 2, there is the signature of C. B. Singh beside the words “Signature of Actual Recipient of above money”.

3. The Application for Membership form in its original state had a receipt attached to it which is designed to be detached and given to the employee on payment of the fee. In the present case, this receipt was signed by Singh on July 27, 1977, indicating that Mr. McMullen had paid \$2.00.

4. McMullen and Singh are in agreement that, notwithstanding the signatures in Section 2 of the membership card certifying payment and acknowledging receipt of \$2.00, and the signing of the receipt for \$2.00 by Singh, which receipt was to be given to McMullen, no money in fact changed hands on that date. It is plain, therefore, that the membership evidence in question does not, on its face, accurately reflect what transpired on July 27th.

5. Singh's evidence was that he followed the same procedure with other employees

who, in fact, did not pay on the date that they signed their applications for membership and acknowledgement of payment – that is to say, all sections of the membership card were completed, including the certification of payment and the receipt, before any money had in fact been paid. He said that he kept track of the non-payees by means of the receipt which he did not detach and deliver to the employee concerned until payment had actually been made. Singh thus had, in his possession during the campaign, a number of applications for membership with receipts completed before payment was made. He said he held on to these receipts until he was paid.

6. Singh said that he collected \$2.00 from McMullen on July 28th and gave him a receipt. He said that he had come in on that date, which was his day off, to pick up his pay-cheque and had met McMullen at the security desk. He asked McMullen for the \$2.00 which the latter gave to him. Singh said he then gave McMullen the receipt.

7. Singh had used membership applications which were in book form. The book provided pages upon which a carbon reproduction of the date of signing was shown. This document proved of little help, however, in determining when a person had paid, since Singh had consistently shown only one date, whether money was paid then or not. This meant that once the receipt was removed, the actual date of late payments and, indeed, the payments themselves, were not recorded anywhere in Singh's records.

8. He testified, that on August 1st he turned in to the union 26 membership applications with \$52.00, representing \$2.00 paid on each one. He later turned in two more cards and \$4.00. This was confirmed by the evidence of Mr. W. E. Cook, President of the applicant union.

9. McMullen flatly denies that he paid \$2.00 or any money to Singh. He also denies that he received a receipt from Singh. He said that he signed the card where he was asked to sign it and did so quite voluntarily because he wanted to join. His evidence was that at the time he signed, no mention whatever was made of a money payment. He told the Board that he later realized he was supposed to pay when he heard others talking about having paid \$2.00.

10. It is significant to note that McMullen stated that a few days after signing he told different people that he had not paid and, in fact, named two of those fellow employees – David Newton and Chabilal Ramcharan. Two to three weeks later, he said, he was asked by Ron Bond, who is in charge of security, if he had paid \$2.00 and replied that he had not.

11. There thus arises a direct conflict in the testimony of McMullen and Singh with respect to the question of payment. In the present case, the Board cannot resolve the matter on the basis of the objective evidence of the application for membership as it did in the *B.F. Goodrich Canada Limited* case, [1969] OLRB Rep. Dec. 1085. In that case, where the Board was confronted with a credibility problem in which it would not prefer the evidence of one witness to that of the other, the Board looked to the objective evidence contained in the membership document and gave effect to the signed written statement of the employee as reliable evidence of payment.

12. In the present case, however, the evidence of both McMullen and Singh effectively destroys the document as reliable, objective evidence by which the question of credi-

bility might be resolved, since they agree there is an untruth contained in the document itself.

13. In the case of *The Watson Manufacturing Company of Paris Limited*, [1967] OLRB Rep. Dec. 862, the Board dealt with a situation in which the organizer followed the same practice as that of Mr. Singh in that he signed receipts in cases where the money had not been collected at the same time.

14. The *Watson* case differs from the instant case in that the organizer in that case was a paid union official who had signed Form 8. There were also important discrepancies in his evidence. Notwithstanding these differences, the pronouncements of the Board with respect to the practice under review are of great significance to anyone who undertakes to obtain membership evidence which will be acceptable to the Board. In paragraph 12 of the above decision, the Board stated:

The practice of signing cards in the manner followed in the case of Mrs. Spence is obviously a dangerous practice and is open to abuse and error. A union representative who engages in such practice runs a great risk. In a prolonged campaign involving a large number of people, the memory of the collector is not always reliable for the purpose of completing Form 8 or for the purpose of testifying concerning the circumstances in which a card was signed and the initiation fee paid. Where a collector engages in the practice of signing and dating membership cards without collecting money at the time of signing, he runs the risk of having his practice challenged. Since his memory is not infallible, the dangerous practice is very suspect and his declaration concerning membership documents is unreliable unless full disclosure of all facts is made.

15. In the present case, the practice against which the Board so forcibly expressed its disapproval has led to the very result of which the Board forewarned.

16. The Board has observed a distinction between the actions of union officials and those of rank and file employees in dealing with questions of conduct related to membership evidence. In the former situation, the Board has discounted all of the membership evidence where its requirements are not met, while in the latter, the Board has discounted, except in the circumstances set out below, only that portion of the membership evidence dealt with by the rank and file employee. Where, however, the fact is that even though the organizer is not a union official he is responsible for the entire organizational campaign, the Board has applied the same standards and made the same disposition as it would in the case of a union officer. (See *Byers Oil Burner Service*, [1969] OLRB Rep. Aug. 595; *Slough Estates Ltd.*, [1965] OLRB Rep. June 173; *Walter E. Selck of Canada Ltd.*, [1964] OLRB Rep. June 138.)

17. It is quite clear that the organizer in the present case has ignored the warnings of the Board set out in the *Watson* case and conducted the campaign, using precisely the procedures against which the Board held forth in that case.

18. The Board expects that parties concerned will duly consider and will attempt to conform to its decisions and particularly those relating to membership evidence. The Board

consequently cannot ignore its own caveat in a case where the organizing procedure adopted flies in the very teeth of its admonitions in that regard, as set out in the *Watson* case.

19. The procedure employed by Singh which, on his own evidence, extended beyond the McMullen document, is inherently dangerous and embodies an unacceptable degree of carelessness and laxity with respect to the obtaining and presentation of membership evidence.

20. Furthermore, insofar as the issue of "non-pay" is concerned, we find, in the circumstances, that we prefer the evidence of McMullen. His evidence was given in a most positive and forthright manner. It is clear that he made known the fact that he had not paid the fee very soon after he signed the card. We find his evidence additionally persuasive in that he unhesitatingly disclosed to the Board the names of two fellow employees to whom he mentioned the fact shortly after he signed the card.

21. Mr. Singh was the sole organizer in the campaign so that, notwithstanding the fact that he is not an official of the union, the Board, in accordance with its usual practice in such circumstances, has no recourse but to dismiss the application.

22. We wish to point out that while dismissing this application, we are nevertheless satisfied that the proper inquiries were made by W. E. Cook, President of the applicant, before he completed and filed Form 8.

Decision of Board Member M. J. Fenwick

- 1) I dissent.
- 2) This is a case in which one of two witnesses testifying under oath could not have told the truth. The majority chooses to believe Kenneth McMullen who alleged he did not pay a \$2.00 fee for membership in the United Plant Guard Workers of America, Local 1962.
- 3) I differ with the majority decision. I believe C. B. Singh, the rank and file employee who enrolled his co-workers in the union, that he did receive the \$2.00 required fee from Kenneth McMullen.
- 4) It is significant that at the first hearing on the application for certification on August 15, 1977 nothing was said by the respondent company or any objecting employee on alleged non pay by certain guards.
- 5) It is also significant that the respondent company made the complaint of non pay after Ron Bond, security supervisor, questioned McMullen and other employees if they signed cards and paid the \$2.00 fee.
- 6) Considering all of the evidence and on the balance of probabilities it is my finding that only the disputed card not be counted and the applicant be certified accordingly.

1119-77-R London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant), v. Waterloo County Roman Catholic Separate School Board, (Respondent).

Certification – Bargaining Unit – Whether students whose wages are subsidized by grants from government make-work programs should be excluded from the unit.

BEFORE: M. G. Picher, Vice-Chairman and Board Members C. G. Bourne and D. B. Archer.

APPEARANCES: Al Campbell and George Moss for the applicant; M.A. Villemare and G. P. Denomme for the respondent.

DECISION OF THE BOARD; December 8, 1977.

1. The name: "The Waterloo County Roman Catholic Separate School Board" appearing in the style of cause of this application as the name of the respondent is amended to read: "Waterloo County Roman Catholic Separate School Board".

2. This is an application for certification.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of The Labour Relations Act.

4. The applicant seeks to represent all employees of the respondent engaged in maintenance, services and plant operations regularly employed for not more than twenty four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman and office staff.

5. The employer submits that students which it has a practice of employing during the school vacation period should be excluded from the proposed unit of part-time employees. It appears that the students are paid both out of funds of the School Board and out of funds provided by government assistance programs, including the Young Canada Work Program of Canada Manpower and the "Experience 77" Program sponsored by the provincial Ministry of Education. Counsel for the respondent argues that the purpose of these programs is to provide jobs for students and that since the pool of funds is limited, and the employer must rely on them, fewer jobs will be available to students if they must be paid the higher wage that he contends would be the likely result of collective bargaining on their behalf within the framework of a unit including part-time employees.

6. His first submission, therefore, is that as a result of the funding arrangements these students are not employees within the meaning of The Labour Relations Act. Alternatively he submits that if they should be found to be employees they should be excluded from the unit of part-time employees for the purposes of collective bargaining. Lastly he submits that if they should be deemed an appropriate inclusion in the part-time bargaining unit the Board should adjourn this application for the taking of a representation vote next July when the students are back on the job.

7. We deal firstly with whether the students in question must be seen as impliedly

excluded from the provisions of The Labour Relations Act by virtue of the make-work schemes by which their wages are partially funded. In a time when many Canadians derive their wages through work support programs such as the Young Canada Work Program, Experience 77, L.I.P., D.R.E.E. and numbers of other schemes for the support of employment through the direct channelling of government funds, or through indirect forms of government subsidy to employers both public and private, that is a question of no small importance for the present and future scope of collective bargaining.

8. The employer did not take the position that the students in question were the employees of the federal or provincial governments that subsidize their wages, nor did it suggest that the students are not the employees of the School Board in the normal sense of the word. No representations to the contrary having been made it seems clear that by accepted labour relations criteria the School Board is in the relationship of employer to the students: it interviews them, hires them and puts them to work for a period of time at a fixed wage computed hourly, weekly or monthly. The work performed is of benefit to the School Board and to that end it assigns, directs and supervises the tasks performed. There seems little doubt that if the work is well performed it will be rewarded by the retention and future re-employment of the student and if badly performed may result in his discipline or perhaps even his discharge by the School Board. Within that framework the students must be seen as employees of the School Board for the purposes of The Labour Relations Act. (See, *Cranbrook and District Hospital* [1975] 1 Canadian L.R.B.R. 42 at 50; and the as yet unreported decision of the B.C. Labour Relations Board *Kelowna Centennial Museum Association*, Board file #50/77 August 23, 1977).

9. In our view the entitlement of the employees in question to the protection of The Labour Relations Act is not altered by the source of the funds which their employer uses to pay them. In the instant case the representative of the union argued that the government student work programs should not be seen as intended to provide a pool of cheap labour. Whatever may be the merits of that argument, we are satisfied that the government programs which support the employer in this case must be taken to contemplate the potential participation of employees in the processes and benefits of the system of collective bargaining that is protected and promoted by statutes both federal and provincial. It would require clear and unequivocal language of the Legislature or cogent evidence to the contrary to lead us to any other conclusion.

10. A similar issue fell to be considered in a recent decision of the British Columbia Labour Relations Board. (*Kelowna Museum, supra*). After an elaborate examination of the facts and competing arguments in that case the Board concluded that six persons working at the Kelowna Centennial Museum under a Local Initiatives Program (L.I.P.) grant were employees under the Labour Code and were included in a bargaining unit with other employees represented by the Canadian Union of Public Employees. In the instant case the employer has not provided this Board with the extensive evidence or argumentation that were provided the B.C. Board, in *Kelowna*. But the issues involved are essentially the same, and in light of the similarities between the British Columbia Labour Code and The Labour Relations Act of this province, we are satisfied that the decision of the British Columbia Board provides the appropriate approach to cases of this kind. In dealing with this issue we could find little to add to the reasoning of the B.C. Board in that case.

11. The next question is whether the students should be segregated from the unit of

part-time employees. The general policy of this Board in respect of student employees, and the rationale for that policy, were stated in *Tillsonburg District Memorial Hospital* (Board file No. 2201-76-R Apr. 27, 1977):

5. Where an application relates purely to a unit of part-time employees the Board has, as a general rule, also applied the view that students employed during the school vacation period and employees regularly employed for not more than 24 hours per week form a bargaining unit with a sufficient community of interest. On the basis of this, the Board has in the past specifically refused to unduly fragment the collective bargaining process by granting separate certificates in respect of students and "24 hour" employees where the presence or history of such employees is established. (See *Chapples Stores Limited* [1970] OLRB Rep. July 530). In some cases the Board has noted that students who are employed during the school vacation period remain employed on a part-time basis through the rest of the year, so that the two descriptions may refer to the same employees. (See, e.g. *Cara Operations Limited* [1975] OLRB Rep. March 209).

12. The segregation of the students from other employees who perform the same work would unduly fragment the employees of the respondent for collective bargaining purposes. Moreover to the extent that students are a transient group that would have difficulty organizing, obtaining certification and bargaining to the conclusion of a collective agreement during the short period of their employment, to separate them from the part-time employees might in all likelihood effectively deprive them of access to any collective bargaining at all. That risk is a consequence to be weighed in determining the appropriate bargaining unit (see, *Canada Trustco Mortgage Company* [1977] OLRB Rep. June 330). Lastly, in determining the appropriate bargaining unit the Board must have regard to the overall viability of the unit for collective bargaining purposes. A concern, therefore, is that the bargaining strength of a trade union is not unduly weakened by the exclusion from the bargaining unit of persons who perform the same work as bargaining unit employees. (*Guelph Beef Centre Inc* [1977] OLRB Rep. Mar 184 at 186). When all of the above criteria are considered, and considering also that there is no evidence that a comprehensive unit of part-time employees and students would unduly hamper the employer in collective bargaining, we conclude that students employed during the school vacation period should not be excluded from the bargaining unit proposed in this application.

13. Before leaving this discussion we would add that it is not self-evident to this Board that, as the employer contends, the representation of students in a bargaining unit with other employees *must* result in the undifferentiated treatment of student employees under the provisions of a collective agreement so as to ultimately narrow their opportunities for employment. Collective bargaining has achieved a level of sophistication where employer and union may well, in their own best interests, use something other than a broad brush in delineating, at the bargaining table, the contract rights of different groups of employees. There are a number of kinds of understanding that can and have been arrived at in collective agreements to accommodate situations which both parties feel merit special treatment. (See the discussion of various contract options in respect of L.I.P. grant employees by the B.C. Board in *Kelowna Centennial Museum, supra*).

14. The final issue is whether this application should be adjourned until next July for the purposes of conducting a representation vote among the employees once the students have returned to work. We think not. Work forces are seldom static. The right of an indeterminate group of future employees to participate in the choice of a collective bargaining agent must, therefore, be weighed against the immediate right to union representation of a large group of employees who are on the job today. To hold in abeyance the rights of the 21 part-time employees presently at work for some eight months pending the hiring of students would, in our view, unduly circumscribe the access of those employees to collective bargaining.

15. The Board therefore finds that all employees of The Waterloo County Roman Catholic Separate School Board engaged in maintenance, services and plant operations regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foremen and office staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

16. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 31, 1977, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of The Labour Relations Act, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

17. A certificate will issue to the applicant.

0831-77-R Canadian Food and Associated Services Union, (Applicant), v. Windsor Arms Hotel Limited, (Respondent), v. International Beverage Dispensers' & Bartenders Union Local 280, (Intervener), v. Group of Employees, (Objectors).

Certification – Whether employer conduct created coercive atmosphere – Where sufficient for certification pursuant to section 7a.

BEFORE: Kevin M. Burkett, Vice-Chairman and Board Members O. Hodges and W.H. Wightman.

APPEARANCES: M. Swenarchuk, Peter Quinn and Wendy Iler for the applicant; I.T. Bern, T. Forster, H. Sonszogni and R. McNeely for the respondent; Julius Troll for the intervener; no one appeared for the objectors.

DECISION OF THE BOARD; November 30, 1977.

1. In a decision dated September 21, 1977 the Board found the applicant to be a trade union within the meaning of Section 1(1)(n) of the Act and certified the applicant un-

der the provisions of Section 6(1a) of the Act as bargaining agent for a unit of full-time employees of the respondent in the Windsor Arms Hotel, Noodles Restaurant and the Bay Street Car. The Board found that the applicant had less than 45 per cent membership support in a unit of part-time employees. The applicant had filed in conjunction with its application for certification, an application under section 7a of the Act. Subsequent to the release of the Board's decision on September 21, 1977 the applicant advised the Board that it wished to proceed with its 7a application in respect of the part-time unit. Accordingly, a hearing was convened to hear evidence and to allow the parties to make representations in respect of the 7a application.

2. The applicant called four witnesses, all of whom are full-time employees of the respondent. The first union witness, Mr. R. Forte, a waiter in the courtyard cafe, testified that Mr. F. Faigaux, the maitre d', called a meeting prior to the start of the shift on August 29 or 30 (the terminal date fixed for the application was August 31, 1977) and expressed concern with the fact that the employees had turned to a trade union. Mr. Forte testified in his examination-in-chief that Mr. Faigaux's "tone was not threatening". He was later asked privately to reconsider his decision to support the union but admitted in cross-examination that he had not changed his mind and that to his knowledge no one changed his position as a result of Mr. Faigaux's meeting.

3. The second union witness was Moejene Lediard a housekeeper at the Windsor Arms Hotel. She testified that she was asked by Mr. Forster, the manager of the hotel, if she had signed a card and admitted to him that she had. She was later spoken to privately by the supervisor of housekeeping and asked to change her mind. She admitted in cross-examination that she had not been threatened by either the manager or the supervisor of housekeeping.

4. The third union witness was Ms. Wendy Iler, an apprentice cook at Noodles, and by her own admission a prime mover behind the union's organizing campaign. She testified that the organizing campaign was in "full swing" by the beginning of July. It was her evidence that during the campaign she was spoken to by the chef about trade union activities and an attempt was made to convince her that a trade union was not needed. She referred to the effect of his interference as "marginal" and testified that she did not become any less committed as a result of his interference. She also referred to other "petty harrassment." She admitted in cross-examination that she did not feel threatened or coerced and that promises were not made to her by the employer. Ms. Iler, who worked at the Noodles Restaurant, was told on August 26, five days before the terminal date, that she was not to visit the Windsor Arms Hotel (at a different location) after hours and that if seen there she would be asked to leave. She admitted that she returned to the Hotel "once or twice" after August 26th. The union filed a section 79 complaint in respect of this last incident which was settled between the parties.

5. The fourth union witness, Mr. Michael La Strange, an assistant pastry chef, testified that in a private conversation with Chef Sonszogni he was asked to oppose the union and was reminded that union dues were \$15 per month. He admitted in cross-examination that he did not feel threatened by chef Sonszogni but rather he felt that the chef was involving himself in a matter which was "none of his business."

6. The company elected not to call any evidence.

7. Section 7a of the Act provides:

"Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

The effect of section 7a is to remove an application for certification from the normal channels wherein the union must demonstrate unqualified majority support either by card count (allowing for a 5 per cent margin of error) or by secret ballot vote. The Board is given a special discretionary power under Section 7a to certify a trade union which does not meet the standard majority requirement. Three conditions must be met before the Board is permitted to exercise its discretion in this regard. It is not sufficient to simply establish a violation of the Act. The three conditions which must be established are:

- (1) An employer contravention of the Act, so that,
- (2) the true wishes of the employees are not likely to be ascertained;
- (3) support for the trade union adequate for collective bargaining.

8. Even if we assume, without finding, that the conduct of the employer in this case constitutes a violation of The Labour Relations Act the Board has not been satisfied that the effect of the employer's conduct has been to make it impossible for the true wishes of the part-time employees to be ascertained in a representation vote. The second condition precedent to the application of Section 7a has not been met.

9. Counsel for the union urged the Board to find that an atmosphere not conducive to free expression prevailed in the work place and to apply the same standards in assessing the ability of employees to express their true wishes as it does in a petition case. The Board, in recognizing the inherent difference between a petition, which is often circulated on the employer's premises, and a secret ballot conducted under the auspices of officials assigned by the Board, applies a different test in respect of the ability of employees to express their true wishes in a secret ballot vote. The Board in differentiating between the two commented at para. 19 of the *Ex-Cell-O Wildex* case, [1977] OLRB Rep. June 370 as follows:

"The Board has indicated, quite clearly that certification without a vote under section 7a is not an automatic response to every unfair labour practice which occurs in the pre-certification period, and that an applicant must establish substantial employer interference in the certification process to secure a determination that "the true wishes of the employees are not likely to be ascertained". (See, for example, *Robin Hood Multifoods Limited*, [1976] OLRB Rep. May 250.) In this regard, a distinction has been drawn between the criteria used to determine whether

a statement of desire (or petition) in opposition to an application for certification reflects the true wishes of the employees who signed it and the criteria used to determine whether the true wishes of the employees are not likely to be ascertained from the results of a representation vote, which is conducted under the supervision of the Board, and by secret ballot. As the Board stated in *Smith Beverages Limited*, [1975] OLRB Rep. Dec. 956, if an employee logically suspects that his employer will become aware of his signing or his refusal to sign a petition, this can effectively thwart his free expression as represented by his signature. For this reason, very little in the way of employer interference, in the surrounding circumstances, need be shown for the Board to conclude that a petition does not represent a true change of mind by the employees who signed it such that it should cause the Board to exercise its discretion to order a vote. The situation is quite different on a representation vote, however, where the employees can usually rest assured that their choice will not be revealed to their employer; and therefore, the Board requires evidence of intimidation or coercion such that the secrecy of the ballot cannot be relied upon to ensure a free expression of employee views."

10. The employer interference complained of in this case does not constitute intimidation, coercion, threats or promises as would undermine the secret ballot as a means of ascertaining the true wishes of the part-time employees of the respondent. The evidence of the union's own witnesses establishes that the employer has not made physical threats nor has he used his position of economic dominance to threaten the job security or economic well-being of his employees, nor has he made monetary or other promises to his employees as would cause them not to express their true wishes in a secret ballot vote. (See *re Robin Hood Multi Foods Limited*, [1976] OLRB Rep. May 250, *Winston Construction Limited*, [1976] OLRB Rep. Nov. 714, *Viceroy Construction Co. Limited*, Board File No. 2155-76-R, decision dated September 9, 1977.) The Board is not prepared to conclude on the evidence before it that the part-time employees, who are the employees in the bargaining unit for which the union asks the Board to apply Section 7a, were intimidated or otherwise adversely affected by the alleged employer interference with the rights of certain of its full-time employees.

11. The restriction placed upon the off-work access of Ms. Iller to the Windsor Arms Hotel may or may not have affected the card-count in respect of the part-time unit. If the union was of a mind that the count was affected by this restriction it was open to the union, following settlement of the section 79 complaint, to have extended its organizing campaign in respect of part-time employees. Indeed, it remains open to the union to continue its organizing in respect of part-time employees. The restriction placed upon Ms. Iller's access to the Windsor Arms, in the absence of any other threat or action by the company against her, could not possibly have affected the ability of the part-time employees to express their true wishes in a secret ballot vote.

12. In the circumstances of this case it is not open to the Board to apply section 7a. If the union wishes to acquire the bargaining rights in respect of the part-time employees of the respondent it must follow the normal certification process as set out in the Act, as it did in acquiring the bargaining rights for the full-time employees of the respondent.

13. This application is dismissed.

CONCURRING DECISION OF BOARD MEMBER O. HODGES:

1. There is no evidence from part-time employees before the Board. The evidence of the full-time employees is quite unlike the evidence adduced in the *Ex-Cell-O Wildex* case, [1977] OLRB Rep. June 370, wherein that applicant was certified under the provisions of Section 7a by the majority of that panel of the Board. I am unable, therefore, to draw the necessary inference to bring Section 7a into play for the part-time unit.
2. The applicant in the instant case may reapply at any time for certification of the part-time unit. Normally no bar to immediate re-application following dismissal of an application is erected, save and except in the case of a lost vote.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 1977

BARGAINING AGENTS CERTIFIED DURING NOVEMBER

No Vote Conducted

0950-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 91 Jameson Avenue, 145 Jameson Avenue and 177 Jameson Avenue, Toronto, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff." (46 employees in the unit).

1337-76-R: Labourers' International Union of North America, Local 183 (Applicant) v. Belmont Property Management (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 16 The Links Road, 24 The Links Road and 37 Lord Seaton Road, Willowdale, including resident superintendents, save and except property managers, persons above the rank of property manager, office and clerical staff, and persons employed for not more than twenty-four hours per week." (3 employees in the unit).

0016-77-R: The Association of Allied Health Professionals: Ontario (Applicant) v. The Salvation Army Grace General Hospital (Respondent).

Unit: "all paramedical employees employed by the respondent in Ottawa, Ontario, save and except supervisors, persons above the rank of supervisor, persons covered under subsisting collective agreements between the respondent and other trade unions, students employed during the school vacation period and other paramedical employees regularly employed for not more than twenty-four (24) hours per week and who are covered by Association of Allied Health Professionals (certificate dated February 7, 1977)." (6 employees in the unit) (*Having regard to the agreement of the parties*). (clarity note - see Report of full decision (1977) OLRB Rep. November).

0045-77-R: The Canadian Union of Public Employees (Applicant) v. Jewish Vocational Service of Metropolitan Toronto (Respondent).

Unit: "all office and clerical, technical, and professional employees of the respondent in Toronto, save and except the executive director, associate director, secretary to the executive director, general office manager, supervisors, the bookkeeper and persons regularly employed for not more than twenty-four hours per week." (26 employees in the unit).

0497-77-R: Ontario Nurses' Association (Applicant) v. Smiths Falls Community Hospital (Respondent).

Unit # 1: "all registered and graduate nurses employed in a nursing capacity at the Smith Falls Community Hospital, Smiths Falls, Ontario, save and except supervisors, persons above the rank of su-

pervisor, persons regularly employed for not more than 24 hours per week and students employed for the school vacation period.” (44 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. November*).

Unit #2: “all registered and graduate nurses regularly employed in a nursing capacity at the Smiths Falls Community Hospital, Smiths Falls, Ontario for not more than 24 hours per week, save and except supervisors and persons above the rank of supervisor.” (52 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. November*).

0932-77-R: International Association of Machinists and Aerospace Workers (Applicant) v. Toledo Scale Division – Reliance Electric Limited (Respondent).

Unit: “all employees of the respondent at its plant in Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff.” (3 employees in the unit).

1014-77-R: The United Brotherhood of Carpenters & Joiners of America Local 2466 (Applicant) v. Meadowbrook Gardens Ltd. (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the County of Renfrew, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

1057-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Bray Construction Co. Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman.” (10 employees in the unit).

1062-77-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Furfari Paving Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen, persons above the rank of non-working foreman and construction labourers employed on building projects.” (3 employees in the unit).

1103-77-R: Canadian Union of Public Employees (Applicant) v. North Bay Hospital Commission operating The North Bay Civic Hospital (Respondent) v. Ontario Public Service Employees Union (Intervener).

Unit: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week save and except professional medical staff, graduate nursing staff, undergraduate nurses, para medical personnel, supervisors or foremen, office personnel, and persons covered by subsisting collective agreements.” (88 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note – see Report of full decision (1977) OLRB Rep. November*).

1115-77-R: United Brotherhood of Carpenters and Joiners of America, Local Union 38 (Applicant) v. Hadovic Construction Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1116-77-R: Hotel, Motel, Restaurant Employees' and Beverage Dispensers' Union Local 757 (Applicant) v. Royal Canadian Legion Ortona Branch # 113 (Respondent).

Unit: "all employees of the Royal Canadian Legion, Ortona Branch # 113, save and except manager and persons above the rank of manager and persons regularly employed for not more than twenty-four hours per week." (5 employees in the unit).

1117-77-R: Canadian Union of Public Employees (Applicant) v. District Municipality of Muskoka (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent save and except Department Heads, persons above the rank of Department Head, persons regularly employed for not more than twenty-four hours per week and employees of the Muskoka District Home for the Aged." (29 employees in the unit). (*Having regard to the agreement of the parties*). (clarity note – see Report of full decision (1977) OLRB Rep. November).

1132-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. One Way Construction Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1133-77-R: Canadian Chemical Workers Union (Applicant) v. Pall (Canada) Limited (Respondent).

Unit: "all employees of the respondent in Brockville, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1136-77-R: Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Eran Haulage Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at or out of the Municipality of York, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1145-77-R: Teamsters Local Union No. 419 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Trent News Company (Respondent).

Unit: "all employees of the respondent working at or out of Cobourg, Ontario, save and except foremen and supervisors, persons above the rank of foreman and supervisors, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (10 employees in the unit).

1151-77-R: Hotels, Clubs, Restaurants, & Tavern Employees Union, Local 261, chartered by Hotel & Restaurant Employees and Bartenders International Union (Applicant) v. Crawley & McCracken (Ontario) Company Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at the Lester B. Pearson Building Cafeteria, 125 Sussex Drive, Ottawa, save and except Chef, persons above the rank of Chef, office staff, and persons regularly employed for not more than twenty-four hours per week." (22 employees in the unit). *(Having regard to the agreement of the parties)*.

1153-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 76 (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at York Condominium Corporation No. 76 (Crescent Town Condominiums and Recreation Centre – Danforth and Victoria Park) save and except property managers, persons above the rank of property manager, office and clerical staff and persons regularly employed for not more than 24 hours per week." (20 employees in the unit).

1155-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. MHG International Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working as instrumentmen, rodmen and chainmen, in the District of Thunder Bay, save and except Party Chief and persons above the rank of Party Chief." (5 employees in the unit). *(Having regard to the agreement of the parties)*.

1160-77-R: Oil, Chemical & Atomic Workers International Union (Applicant) v. Battenfeld Grease (Canada) Ltd. (Respondent).

Unit: "all employees of the respondent at Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical and technical employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (18 employees in the unit).

1162-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Pit-On Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent working in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1163-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Garda Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of the working foreman." (3 employees in the unit).

1165-77-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dashwood Industries Limited (Respondent).

Unit: "all servicemen/repairmen employed by the respondent at and out of its plant located at Centrailia, save and except foremen and persons above the rank of foreman." (11 employees in the unit).

1167-77-R: Teamsters Local 879 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Canadian Industries Limited, Distribution Department, Sulphuric Acid Depot (Respondent).

Unit: "all Depot Attendants employed by the respondent at 6300 Oldfield Road, Niagara Falls, Ontario, save and except assistant-foremen, those above the rank of assistant-foreman, office and sales staff and students employed during the school vacation periods." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1172-77-R: International Ladies' Garment Workers' Union (Applicant) v. Trojan Sportswear Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales and office staff, and students employed during the school vacation year." (41 employees in the unit). (*Having regard to the agreement of the parties*).

1178-77-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Traugott Construction Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1179-77-R: Ontario Nurses' Association (Applicant) v. Brantwood Manor Nursing Homes Limited (Respondent).

Unit: "all registered and graduate nurses employed by Brantwood Manor Nursing Homes Limited, Burlington, in a nursing capacity save and except the Director of Nursing and persons above the rank of Director of Nursing." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1192-77-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. G.L. Processing (1974) Limited (Respondent).

Unit: "all employees of the respondent at Windsor, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (14 employees in the unit).

1193-77-R: Christian Labour Association of Canada (Applicant) v. Maple Engineering and Construction Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Simcoe, the District Municipality of Muskoka and the Township of Thorah and all land north thereof in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1207-77-R: London and District Service Worker's Union, Local 220 S.E.I.U. A.F.L. C.I.O. and C.L.C. (Applicant) v. Pinehaven Nursing Home Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Waterloo, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and office staff." (47 employees in the unit). (*Having regard to the agreement of the parties*).

1208-77-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Pinehaven Nursing Home Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Pinehaven Nursing Home Ltd. at Waterloo, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, registered nurses and office staff." (16 employees in the unit).

1218-77-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Gignac Construction (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1220-77-R: Labourers' International Union of North America, Local 527 (Applicant) v. John Vachinno of Ottawa Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1222-77-R: Service Employees Union, Local 478 affiliated with Service Employees International Union, A.F. of L., C.I.O., C.L.C. (Applicant) v. VS Services Ltd. (Respondent).

Unit #1: "all employees of the respondent at the premises of the Huntsville Memorial Hospital, Huntsville, Ontario save and except supervisors, persons above the rank of supervisor, office staff, dietitians, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at the premises of the Huntsville Memorial Hospital, Huntsville, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and dietitians." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1234-77-R: Wood, Wire and Metal Lathers International Union Local 562 (Applicant) v. Supreme Interior Drywall and Painting (Respondent).

Unit: "all lathers and lathers' apprentices in the employ of the respondent in the County of Wellington, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. November*).

1235-77-R: United Brotherhood of Carpenters and Joiners of America – Local Union 3 (Applicant) v. E. S. Martin Construction (Ontario) Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carlton and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

1242-77-R: Christian Labour Association of Canada (Applicant) v. Tecumseth Industrial Services Limited (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in the County of Lanark and the Townships of North Crosby, South Crosby, South Burgess, Bastard, South Elmsley and Kitley in the County of Leeds and the Townships of Wolford, Oxford and South Gower in the County of Grenville, save and except non-working foremen and persons above the rank of foreman." (2 employees in the unit).

1246-77-R: The International Association of Bridge, Structural & Ornamental Ironworkers, Local 736 (Applicant) v. Pro-Eng Buildings Limited (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in the unit). (*clarity note – see Report of full decision (1977) OLRB Rep. November*).

1258-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Steel Town Construction Limited (Respondent).

Unit: "all employees of the respondent engaged in concrete forming on residential building projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

1259-77-R: International Union of Operating Engineers, Local 793 (Applicant) v. Robert McAlpine Ltd. (Respondent).

Unit: "all employees of the respondent working in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1267-77-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 2480, 2482, 3277 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Jaysam Enterprises (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1276-77-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Coronet Carpets Limited (Respondent).

Unit: "all employees of the respondent working at Mississauga, save and except managers (including the warehouse supervisor), persons above the rank of manager, office and sales staff and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

Applications Certified Subsequent to Pre-Hearing Vote

0703-77-R: Canadian Chemical Workers Union (Applicant) v. York Cartage Service Limited (Respondent) v. Christian Labour Association of Canada (Intervener).

Unit: "all employees of York Cartage Service Limited employed in and out of Mississauga, save and except foremen, persons above the rank of foreman, dispatchers, and office and sales staff." (27 employees in the unit).

Number of names of persons on list as originally prepared by employer	25
Number of persons who cast ballots	22
Number of ballots marked in favour of applicant	18
Number of ballots marked in favour of intervener	4

0884-77-R: International Union of Electrical, Radio and Machine Workers – AFL-CIO-CLC (Applicant) v. Lorain Products (Canada) Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of Lorain Products (Canada) Ltd. at St. Thomas, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation periods." (62 employees in the unit).

Number of names of persons on revised voters' list	58
Number of persons who cast ballots	58
Number of ballots excluding segregated ballots cast by persons whose names appear on voters' list	58

BALLOT BOX SEALED

1007-77-R: The Employees' Association of Interline Furniture Limited (Applicant) v. Interline Furniture Limited (Respondent).

Unit: "all employees of the Respondent at Hawkesbury, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (125 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	128
Number of persons who cast ballots	100
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	91
Number of ballots marked against applicant	8

1069-77-R: International Molders & Allied Workers Union (Applicant) v. O-Pee-Chee Company Limited (Respondent) v. Bakery and Confectionery Workers International Union of America (Intervener).

Unit: "all employees of the respondent save and except foremen, foreladies, persons above the rank of foreman and forelady and office staff." (141 employees in the unit).

Number of names of persons on revised voters' list	131
Number of persons who cast ballots	120
Ballots segregated and not counted	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	77
Number of ballots marked in favour of The O-Pee-Chee Company Employees' Independent Union	40

1098-77-R: United Steelworkers of America (Applicant) v. Electrohome Limited carrying on business as Lightning Circuits Electrohome Limited (Respondent).

Unit: "all employees of the respondent employed in and about the respondent's manufacturing plant located at Niagara-on-the-Lake, save and except formen, persons above the rank of foreman, office staff, engineering staff and plant protection staff." (12 employees in the unit).

Number of names of persons on list as originally prepared by employer	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	2

Application Certified Subsequent to Post-Hearing Vote

0935-77-R: Toronto Newspaper Guild, Local 87 of The Newspaper Guild (Applicant) v. The Globe and Mail Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all District sales representatives employed by the Respondent in its circulation department in the Province of Ontario, save and except branch managers and persons above the rank of branch manager, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period and employees presently covered by subsisting collective agreements." (55 employees in the unit).

Number of names of persons on list as originally prepared by employer	52
Number of persons who cast ballots	49
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	23

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0465-77-R: The Association of Professional Student Services Personnel (Applicant) v. The Halton Board of Education (Respondent). (16 employees).

0831-77-R: Canadian Food and Associated Services Union (Applicant) v. Windsor Arms Hotel Limited (Respondent) v. International Beverage Dispensers' & Bartenders Union Local 280 (Intervener) v. Group of Employees (Objectors). (00employees).

0951-77-R: International Union, United Plant Guards Local 1962 (Applicant) v. Canadian Protection Services Ltd. (Respondent). (256 employees).

1019-77-R: Labourers' International Union of North America, Local 506 (Applicant) v. Tri-Krete Limited (Respondent). (11 employees).

1027-77-R: Labourers' International Union of North America, Local 607 (Applicant) v. Laurentian Insulations Limited (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervener #1) v. United Brotherhood of Carpenters and Joiners of America, Local 1669 (Intervener #2). (5 employees).

1105-77-R: The Employees of Vallance Brown and Co. Ltd. (Applicant) v. Teamsters Local Union 879 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Respondent) v. Vallance Brown and Co. Ltd. (Intervener). (6 employees).

1187-77-R: Hamilton Can Workers Union – Charter 354 – C.L.C. (Applicant) v. M and T Chemicals Ltd. (Respondent) v. Group of Employees (Objectors). (20 employees).

1260-77-R: Labourers' International Union of North America, Local Union No. 597 (Applicant) v. Plyform Construction (Respondent). (17 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0883-77-R: Nairn Centre Sawmill Workers' Union (Applicant) v. E. B. Eddy Forest Products Ltd. Wood Products Division (Respondent) v. Lumber and Sawmill Workers' Union Local 2693 of the United Brotherhood of Carpenters and Joiners of America (Intervener).

Voting Constituency: "All employees of the Respondent in its operations in the Township of Nairn save and except foremen, persons above the rank of Foreman, Scalers, Office Staff and Security Personnel." (216 employees).

Number of names of persons on revised voters' list	216
Number of persons who cast ballots	198
Number of ballots marked in favour of applicant	84
Number of ballots marked in favour of intervener	114

Certification Dismissed Subsequent to Post-Hearing Vote

0520-77-R: Toronto Newspaper Guild, Local 87 of the Newspaper Guild (Applicant) v. The Globe and Mail Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the Municipality of Metropolitan Toronto in the respondent's Classified and Display Advertising Departments, save and except Supervisors and Co-ordinators, persons above the rank of supervisor and co-ordinator, secretaries to the Director of Sales, Advertising Manager, National Advertising Manager, Retail Advertising Manager, Manager, Classified Advertising Department, Assistant Manager, Classified Advertising Department, Manager Outside Sales, Telephone Room Manager, Front Counter Manager, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (119 employees in the unit). (*clarity note* – see Report of full decision (1977) OLRB Rep. November).

Number of names of persons on revised voters' list	114
Number of persons who cast ballots	101
Number of ballots marked in favour of applicant	39
Number of ballots marked against applicant	62

0933-77-R: The Sheet Metal Workers International Association, Local Union No. 562 (Applicant) v. N. R. Murphy Limited (Respondent).

Unit: "all sheet metal workers and sheet metal apprentices in the employ of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township, save and except non-working foremen and persons above the rank of non-working foreman." (13 employees in the unit).

Number of names of persons on list as originally prepared by employer	13
Number of persons who cast ballots	14
Ballots segregated and not counted	1
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	7

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0631-77-R: Ontario Haulers Union (Applicant) v. Barlin Construction LTD. and National Slag LTD. (Respondent) v. Teamsters, Local Union No. 879 (Intervener). (24 employees).

0639-77-R: Ontario Haulers Union (Applicant) v. North York Sand and Gravel LTD. (Respondent). (23 employees).

0741-77-R: Ontario Haulers Union (Applicant) v. Gormley Sand and Gravel Ltd. (Respondent). (9 employees).

0750-77-R: Ontario Haulers Union (Applicant) v. Lee Sand and Gravel Ltd. (Respondent). (18 employees).

0979-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. G. W. Barr Construction & Engineering Limited (Respondent). (4 employees).

1138-77-R: Labourers' International Union of North America Local 491 (Applicant) v. Bird Construction (Respondent). (6 employees).

1173-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Costain Estates Limited, and Teskey Construction Company Limited (Respondent). (5 employees).

1174-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Costain Estates Limited (Respondent). (14 employees).

1175-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Costain

Estates Limited and P. S. Excavating and Grading Limited, carrying on business under the firm name and style as Land, Excavating and Grading (Respondents). (9 employees).

1181-77-R: International Association of Machinist and Aerospace Workers (Applicant) v. Schrader Fluid Power Division of Scovill Industries Limited (Respondent). (3 employees).

1190-77-R: Breweries, Soft Drink, Distillery Distributors & Miscellaneous Workers, Local 1000 Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Pop Shoppes (Toronto) Limited (Respondent). (2 employees).

1219-77-R: Labourers' International Union of North America, Local 183 (Applicant) v. Environmental Technical Services (Respondent) v. Labourers' International Union of North America, Local 506 (Intervener #1) v. The General Contractors' Section of the Toronto Construction Association (Intervener #2). (2 employees).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

0984-77-U: United Brotherhood of Carpenters and Joiners of America, Local 1256 David Miguel and Florien Rondeau (Complainants) v. Foster Wheeler Limited (Respondent) v. Labourers' International Union of North America, Local 1089 (Intervener). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0395-77-R: Patrick B. Windross (Applicant) v. Oil, Chemical and Atomic Workers International Union Local 9-599 (Respondent). (*Granted*).

Unit: "Truck drivers, auto mechanics, truck washers greasers loaders and warehousemen of Texaco Canada Limited who work in/or operate out of the Company's Bulk Station at Toronto, Ontario." (15 employees in the unit).

Number of names of persons on list as originally prepared by employer	15
Number of persons who cast ballots	14
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	13

0843-77-R: Galdino Berdwesco, Peter McLean, Don Loder (Applicants) v. United Steelworkers of America (Respondent). (65 employees). (*Dismissed*).

0873-77-R: Robert Spearman (Applicant) v. United Electrical Radio & Machine Workers of America (UE) (Respondent) v. Westinghouse Canada Limited (Intervener). (*Granted*).

Unit: "all office and clerical employees of (Westinghouse Canada Limited's) plant located at Huron Street and Clarke Side Road, in the City of London, save and except foremen and supervisors, those above the rank of foreman and supervisor, professional engineers, nurse, secretaries to each of the Plant Manager, the Personnel Manager, the Manager of Station Products, the Manager of Protective Products, and the Manager of Manufacturing, Personnel Department, buyers, marketing negotiators,

manufacturing engineers, industrial engineers, analysts, assistant engineering mechanical, assistant engineering electrical, section head cost accounting, co-ordinators, clerks-engineering, programmers, key-punch operators, security guards, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, students employed on a co-operative training programme and those covered by the Collective Agreement between Westinghouse Canada Limited and the United Electrical, Radio and Machine Workers of America (U.E.) Local 546." (42 employees in the unit).

Number of names of persons on list as originally prepared by employer	43
Number of persons who cast ballots	41
Number of ballots marked in favour of Respondent	18
Number of ballots marked against Respondent	23

0934-77-R: William Fish (Applicant) v. International Union of Operating Engineers, Local 772 (Respondent) v. Burns Meats Ltd. (Intervener). (*Granted*).

Unit: "all stationary engineers, save and except the Chief Engineer, employed as such on a regular full-time basis in the plant of Burns Meats Ltd., Kitchener, Ontario." (6 employees in the unit).

Number of names of persons on list as originally prepared by employer	6
Number of persons who cast ballots	6
Number of ballots marked in favour of Respondent	0
Number of ballots marked against Respondent	6

1002-77-R: Louis Rispolie, Ivan Munster, R. H. Olsen and Robert Kelly (Applicants) v. Labourers' International Union of North America Local 183 (Respondent) v. York Condominium Corporation No. 78 (Intervener). (4 employees). (*Dismissed*).

APPLICATION FOR DECLARATION OF SUCCESSOR STATUS

1262-77-R: Canadian Union of Public Employees (Applicant) v. Staff Association of West End Creche (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

1183-77-U: Newman Steel Limited (Applicant) v. United Steelworkers of America, Local 8214, Bill Fuller, J. Canido and others (See Attached Schedule "A") (Respondents). (*Withdrawn*).

1245-77-U: The Lummus Company Canada Limited (Applicant) v. Basil Ware, Vernon Watson, Frank Leslie, et al (See Schedule A attached hereto) and Omar Phillips, Wayne A. Aselton, Kelly J. Marlatt, et al (See Schedule B attached hereto) (Respondents). (*Direction*).

APPLICATION FOR DECLARATION THAT LOCK-OUT UNLAWFUL

0575-77-U: International Beverage Dispensers' & Bartenders Union, Local 280 of the Hotel & Res-

taurant Employees' and Bartenders' International Union, AFL, CIO, CLC (Applicant) v. 251628 Holdings Limited trading as Jimmy'z II (Respondent). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0690-77-U: Roger St. George (Applicant) v. E. B. Eddy Forest Products Ltd., and its officials – L. MacFarlane, R. Desjardins, R. Holmes, A.H. Fuller, F. Plouffe, E. Shank, and B. Fretz, R. Little (Respondent #1) v. Lumber and Sawmill Workers' Union, Local 2693 and its representatives, officers and members – C. Seguin, N. Gillis, S. McIntyre, Y. Woods, R. Boyuk, L. Larocque, Y. Fournier, E. Roussy (Respondent #2). (*Withdrawn*).

0702-77-U: Roger St. George (Applicant) v. Lumber and Sawmill Workers' Union, Local 2693, and its representatives, officers and members – C. Seguin, N. Gillis, S. McIntyre, Y. Woods, R. Boyuk, L. Larocque, Y. Fournier, E. Roussy, F. Phillion (Respondents). (*Withdrawn*).

0952-77-U: Retail Clerks Union, Local 409 (Applicant) v. Beaver Lumber Limited (Respondent). (*Withdrawn*).

1033-77-U: Service Employees Union, Local 204 (Applicant) v. Leisure World Nursing Homes Limited (Respondent). (*Withdrawn*).

1204-77-U: Hotel and Restaurant Employees Union, Local 756, and Mr. Sandy Potter, and Mrs. Sandy Potter, and Mr. Jacques Hebert, officers of said Local 756 (Applicant) v. Niagara Beverage Dispensers and Hotel Employees Union, and Mr. Wayne McTaggart, President of said Union, Mr. Philip Slade, Vice-President of said Union, all other officers of said union and Mr. J. Cameron Nelson, advisor to said Union (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

1065-76-U: Federation of Community Agency Staffs (Complainant) v. Catholic Children's Aid Society of Metropolitan Toronto (Respondent). (*Dismissed*).

1665-76-U: Association of Professional Student Services Personnel (Complainant) v. The Board of Education for the Borough of Etobicoke (Respondent) v. Federation of Women Teachers' Association of Ontario, Women Teachers' Association of Etobicoke, Ontario Secondary School Teachers Federation, and District 12, Ontario Secondary School Teachers Federation (Intervenors). (*Dismissed*).

2081-76-U: The Ottawa Newspaper Guild, Local 205, and The Ottawa Typographical Union, Local 102 (Complainants) v. The Journal Publishing Company of Ottawa Limited and L.A. Lalonde (Respondents).

- and -

0041-77-U: The Ottawa Newspaper Guild, Local 205, and The Ottawa Typographical Union, Local 102 (Complainants) v. The Journal Publishing Company of Ottawa Limited (Respondent).

- and -

0048-77-U: The Journal Publishing Company of Ottawa Limited (Complainant) v. The Ottawa

Newspaper Guild, Local 205, and The Ottawa Typographical Union, Local 102 (Respondents). (*Dismissed*).

2098-76-U: Roger St. George (Complainant) v. Lumber and Sawmill Workers' Union, Local 2693 (Respondent) v. E. B. Eddy Forest Products Ltd. (Intervener). (*Dismissed*).

0476-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. 251628 Holdings Limited trading as Jimmy'z II (Respondent).

- and -

0518-77-U: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, A.F.L.-C.I.O.-C.L.C. (Complainant) v. 251628 Holdings Limited trading as Jimmy'z II (Respondent). (*Granted*).

0510-77-U: United Brotherhood of Carpenters and Joiners of America, Local 2679 (Complainant) v. Premium Forest Products Limited (Respondent). (*Granted*).

0581-77-U: International Beverage Dispensers and Bartenders Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L., C.I.O., C.L.C. (Complainant) v. The New Gregory House Inc. (Respondent).

- and -

0635-77-U: International Beverage Dispensers and Bartenders Union, Local 280 of the Hotel and Restaurant Employees and Bartenders International Union A.F.L., C.I.O., C.L.C. (Complainant) v. The New Gregory House Inc. (Respondent). (*Granted*).

0603-77-U: Retail Clerks Union, Local 486, Chartered by the Retail Clerks International Association (Complainant) v. Quinte Sanitation Services Limited (Respondent). (*Granted*).

0609-77-U: Ivan Pletikos (Complainant) v. United Steelworkers of America Local 3394 (Respondent). (*Dismissed*).

0638-77-U: John Bernard (Complainant) v. Scarborough General Hospital and Canadian Union of Public Employees (Respondent). (*Dismissed*).

0689-77-U: Roger St. George (Complainant) v. E. B. Eddy Forest Products Ltd. and its officials – L. MacFarlane, R. Desjardins, R. Holmes, A.H. Fuller, F. Plouffe, E. Shank, and B. Fretz, R. Little (Respondent #1) v. Lumber and Sawmill Workers' Union, Local 2693 and its representatives, officers and members – C. Seguin, N. Gillis, S. McIntyre, Y. Woods, R. Boyuk, L. Larocque, Y. Fournier, E. Roussy (Respondent #2). (*Withdrawn*).

0701-77-U: Roger St. George (Complainant) v. Lumber and Sawmill Workers' Union, Local 2693, and its representatives, officers and members – C. Seguin, N. Gillis, S. McIntyre, Y. Woods, R. Boyuk, L. Larocque, Y. Fournier, E. Roussy, F. Phillion (Respondent #1) v. E. B. Eddy Forest Products Ltd. (Respondent #2). (*Withdrawn*).

0850-77-U: Antonietta Franchi (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

0852-77-U: Anna Ammanati (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

0858-77-U: Emilia Adamo (Complainant) v. Amalgamated Clothing and Textile Workers Union (Respondent). (*Withdrawn*).

0977-77-U: International Ladies Garment Workers' Union – AFL – CIO, CLC (Complainant) v. Mavis Vos Limited (Respondent). (*Withdrawn*).

1032-77-U: Service Employees Union, Local 204 (Complainant) v. Leisure World Nursing Homes Limited (Respondent). (*Withdrawn*).

1940-77-U: The International Union of Electrical, Radio and Machine Workers, – AFL, CIO, CLC (Complainant) v. Lorain Products (Canada) Ltd. (Respondent). (*Granted*).

1080-77-U: Canadian Workers Union (Complainant) v. Canron Limited, Eastern Structural Division (Respondent). (*Dismissed*).

1093-77-U: Minel Samuels (Complainant) v. Amalgamated Clothing Textile Workers Union and its servants and agents (Respondent). (*Withdrawn*).

1101-77-U: Service Employees Union, Local 204, AFL, CIO, CLC (Complainant) v. International Chinese Restaurant (Respondent). (*Withdrawn*).

1154-77-U: The London Civic Employees Local Union # 107 (Complainant) v. The Corporation of the City of London (Respondent). (*Withdrawn*).

1201-77-U: Hotel and Restaurant Employees Union, Local 756, chartered by Hotel & Restaurant Employees and Bartenders International Union (AFL-CIO-CLC) (Complainant) v. Niagara Peninsula Beverage Dispenser & Hotel Employees Union; and Wayne McTaggart, President; and Philip Slade, Vice-President, et al (Respondent). (*Withdrawn*).

1202-77-U: Hotels, Clubs, Restaurants & Taverns Employees Union, Local 261 (Complainant) v. Crawley & McCracken (Ontario) Company Ltd. (Respondent). (*Withdrawn*).

1203-77-U: Hotels, Clubs, Restaurants & Tavern Employees Union, Local 261 (Complainant) v. Crawley & McCracken (Ontario) Company Ltd., Lester B. Pearson Cafeteria, Ottawa (Respondent). (*Withdrawn*).

1228-77-U: Canadian Chemical Workers Union (Complainant) v. York Cartage Service Limited and Carl McLean (Respondents) v. Christian Labour Association of Canada (Intervener). (*Withdrawn*).

1238-77-U: Canadian Union of Public Employees (Complainant) v. Regional Municipality of Halton (Respondent). (*Withdrawn*).

1244-77-U: Morris Tanti (Complainant) v. Rexdale Local 1646 – Canadian Paperworkers Union (Respondent). (*Withdrawn*).

1292-77-U: The Canadian Union of Public Employees and its Local # 1931 (Complainant) v. House of Concord (Salvation Army)

APPLICATION UNDER SECTION 10 (RIGHT OF ACCESS)

1261-77-M: United Steelworkers of America (Applicant) v. Campbell Red Lake Mines Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 39

0812-77-M: Miss Sharon Kay Flint (Applicant) v. Canadian Union of Public Employees Local 2035 (Respondent Trade Union) v. Corporation of the City of Brockville (Respondent Employer). (*Direction*).

1109-77-M: Andries Van Es (Applicant) v. United Cement, Lime and Gypsum Workers International Union, A.F.L., C.I.O., C.L.C., Local 487 (Respondent Trade Union) v. General Concrete of Canada Ltd. (Respondent Employer). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1229-77-M: The Canadian Linen Supply (Ontario) Limited (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union). (*Terminated*).

1230-77-M: Essex Linen Supply (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union). (*Terminated*).

1231-77-M: Work Wear Corporation of Canada Ltd. Windsor, Ontario (Employer) v. Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 55

0477-77-R: International Beverage Dispensers' and Bartenders' Union Local 280 of the Hotel & Restaurant Employees and Bartenders International Union, A.F.L. – C.I.O. – C.L.C. (Applicant) v. 251628 Holdings Limited trading as Jimmy'z II (Respondent). (*Granted*).

0655-77-R: The International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) (Applicant) v. Hughes Boat Works Incorporated (Respondent) v. Employee (Objector). (*Granted*).

1224-77-R: Boot and Shoe Workers' Union Affiliated with the Canadian Labour Congress, and the AFL-CIO (Applicant) v. Madoc Manor, Lodge and Retirement Home (Respondent). (*Withdrawn*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1893-76-M: Canadian Union of Public Employees Local 1953 (Applicant) v. The Regional Municipality of York (Respondent).

0617-77-M: Office & Professional Employees International Union, Local 81 (Applicant) v. Canadian Car Division, Hawker Siddeley Canada Limited (Respondent). (*Dismissed*).

1100-77-M: House of Concord (Salvation Army) (Employer) v. The Canadian Union of Public Employees and its Local #1931 (Trade Union). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

1058-77-M: Great Lakes Paper Company Ltd. (Employer) v. Canadian Paper Workers Union Local 257 (Trade Union).

APPLICATIONS UNDER SECTION 112A

0613-77-M: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Ponti Group Masonry Ltd. (Respondent).

0912-77-M : Labourers' International Union of North America, Local 506 (Applicant) v. The General Contractors Section of the Toronto Construction Association, and Petrisan Contracting (Ont.) Ltd. (Respondents).

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